

NOTES

Cockle: Importing Health Benefits Into Wages—An Invitation for Legislative Review of the Wage Definition Under Washington’s Industrial Insurance Act

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It might very well be that it would be wiser to provide by legislation for the result contended for by respondent workman. We may not, however, under the guise of construction substitute our view for that of the legislature. We are not a super legislature.¹

INTRODUCTION

Every day workers suffer work-related injuries or illnesses. Since the early twentieth century, society has compensated injured workers through the workers’ compensation system.² As part of their compen-

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1. *Courtright v. Sahlberg Equip., Inc.*, 88 Wash. 2d 541, 545, 563 P.2d 1257, 1260 (1977).

2. The workers’ compensation system was designed to address the growing number of work-related injuries incurred during the industrial revolution. Prior to the creation of workers’ compensation in the early twentieth century, injured workers had to file lawsuits to receive compensation following a work-related injury. If they could establish that the employer was in some way negligent or at fault, injured workers received whatever benefits a jury would award them, including compensation for pain and suffering and loss of enjoyment of life. See Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers’ Compensation in the United States, 1900-1930*, 41 J.L. & ECON. 305, 307–08 (1998). “A variety of common-law defenses protected

sation, workers receive wage-replacement benefits for disabilities, medical expenses, and vocational rehabilitation.³ The amount of benefits received by a worker is based upon the worker's wages at the time of injury.⁴

Like most states, Washington has a complicated workers' compensation statute, the Industrial Insurance Act (IIA),⁵ which sets forth a formula for calculating wages. IIA defines "wages" as monetary payment in addition to the value of "board, housing, fuel, or consideration of like nature" to those items.⁶ The phrase "other consideration of like nature" has been the subject of much litigation regarding the intent of Washington's Legislature (Legislature). The Washington Supreme Court recently interpreted this phrase in *Cockle v. Department of Labor & Industries*,⁷ holding for the first time that IIA's definition of "wages" includes the reasonable value of employer-provided health insurance.

Cockle represents a sea change in Washington's industrial insurance law because fringe benefits have never been included in the definition of "wages" under Revised Code of Washington (RCW) 51.08.178. Including health insurance as wages conflicts with common wage definitions.⁸ Therefore, the *Cockle* decision creates the impetus for a bitter struggle over the calculation of workers' compensation under IIA.⁹ This struggle will have long-term effects on stakeholders, particularly self-insured employers and state agencies that administer and adjudicate injured workers' claims.

employers from liability, but once plaintiffs overcame these defenses, employers faced the possibility of ruinous awards that were not covered by insurance." Debra T. Ballen, *The Sleeper Issue in Health Care Reform: The Threat to Workers' Compensation*, 79 CORNELL L. REV. 1291, 1292 (1994).

3. IRENE SCHARF & WILLIAM D. HOCHBERG, WORKERS' COMPENSATION PRACTICE, 1A WASHINGTON PRACTICE § 59.6 (4th ed. 2001).

4. See generally 5 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 93.01(1)(a), at 93-4 to -6 (2001) [hereinafter LARSON] (describing the most common wage-calculation statute). In 1991, Lex Larson officially assumed authorship of the workers' compensation treatise that was originally written by his father, Arthur Larson. See Larson's Worker's Compensation Pages, *About Lex Larson*, available at <http://www.larsonpubs.com/aboutlex.html>.

5. WASH. REV. CODE tit. 51 (2000).

6. WASH. REV. CODE § 51.08.178(1) (2000) ("For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned . . .").

7. 142 Wash. 2d 801, 16 P.3d 583 (2001).

8. See LARSON, *supra* note 4, § 93.01(2)(b), at 93-21 (stating that most jurisdictions view the concept of "wages" as excluding fringe benefits).

9. WASH. REV. CODE tit. 51 (2000).

By including employer-provided health insurance in IIA's definition of "wages," the *Cockle* majority stated that its decision continues "serving the goal of swift and certain relief for injured workers."¹⁰ However, while attempting to advance an objective of Washington's workers' compensation system, the majority improperly substituted its view of wages for that of the Legislature. The majority's decision will result in significant policy changes to industrial insurance law, changes best left to the legislative process. The Legislature should narrow the scope of this "judicial legislation in the guise of statutory construction"¹¹ because the decision offers little guidance to the stakeholders and no principled limitation on the scope of benefits.

This Note addresses the efficacy of construing the term "wages" in RCW 51.08.178 to include employer-provided health insurance, hoping to serve as a resource for the Legislature to reevaluate IIA's wage definition in light of *Cockle*. First, this Note gives a general background of IIA and the Act's time-loss compensation scheme. Next, this Note discusses how Washington and other jurisdictions treat fringe benefits in defining "wages." This Note then examines the Washington Supreme Court's ground-breaking decision in *Cockle*, in which the court held that the value of employer-provided medical and dental benefits are part of the basis used to calculate workers' compensation payments. Finally, this Note analyzes the implications of *Cockle* and argues that the Legislature should narrow the *Cockle* court's interpretation of wages.

I. WASHINGTON'S INDUSTRIAL INSURANCE ACT

Enacted in 1911,¹² IIA is the result of careful balancing between business and labor interests.¹³ Workers receive guaranteed limited compensation for work-related injuries on a "no-fault" basis, while employers provide statutorily prescribed benefits in order to be re-

10. *Cockle*, 142 Wash. 2d at 822, 16 P.3d at 593 (quoting *Weyerhaeuser Co. v. Tri*, 117 Wash. 2d 128, 138, 814 P.2d 629, 634 (1991)).

11. Appellant's Brief at 37, *Cockle v. Dep't of Labor & Indus.*, 96 Wash. App. 69, 977 P.2d 668 (1999) (No. 22486-1-II).

12. Laws of 1911, ch. 74, at 345, REMINGTON REV. STAT. §§ 7673-7724, 10836(4) (current version in scattered sections of WASH. REV. CODE tit. 51); see also *Sertz v. Indus. Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256, 258 (1916) (explaining the genesis of Washington's workers' compensation scheme).

13. See *Brand v. Dep't of Labor & Indus.*, 139 Wash. 2d 659, 668, 989 P.2d 1111, 1115 (1999) ("This 'grand compromise' operates as a quid pro quo in which employers and employees exchange procedural and substantive rights for an ordered system of certain compensation without regard to fault."); *Birklied v. Boeing Co.*, 127 Wash. 2d 853, 859, 904 P.2d 278, 282 (1995) (noting that Washington's IIA was the product of a grand compromise in 1911).

leased from civil liability under the "exclusive remedy" doctrine.¹⁴ IIA is liberally construed to give effect to its remedial purpose of minimizing work-related suffering and economic loss.¹⁵

As part of its wage-replacement scheme, IIA grants "time-loss benefits" to a worker who suffers temporary total disability due to an industrial injury.¹⁶ The amount of payment for time-loss benefits depends upon the worker's marital status, number of dependents, and monthly wages.¹⁷ Payments continue until a physician releases the temporarily disabled worker for any kind of gainful employment, or until the worker's claim is closed.¹⁸ If the worker's earning capacity is only partially restored after returning to gainful employment, the worker becomes eligible for "loss of earning power benefits."¹⁹ Time-loss and loss of earning power benefits are intended to reflect a worker's "lost earning capacity,"²⁰ and monthly payments are capped at the applicable percentage of the state's average monthly wage.²¹

Although funding sources are different, every employer has a duty to secure time-loss benefits payment.²² Those not self-insured

14. See WASH. REV. CODE § 51.04.010 (2000) (providing "sure and certain relief" for injured workers, regardless of fault and to the exclusion of every other remedy); Darin Calbreath Davidson, *Expansion of the "Deliberate Intention" Exception to Washington's Workers' Compensation Exclusivity: Following Birkliid v. Boeing Co., When Does an Employer Intend Employee Injury?*, 32 GONZ. L. REV. 225, 231 (1997) (discussing mechanics of the "exclusive remedy" doctrine).

15. See WASH. REV. CODE § 51.12.010 (2000) ("There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state. This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment."); *Double D Hop Ranch v. Sanchez*, 133 Wash. 2d 793, 798, 947 P.2d 727, 729 (1997) (holding that IIA is remedial in nature and should be liberally construed to compensate injured workers, with doubts resolved in favor of the worker).

16. WASH. REV. CODE § 51.32.090(1) (2000). "Temporary total disability" is a condition that temporarily incapacitates a worker from undertaking gainful employment. *Hubbard v. Dep't of Labor & Indus.*, 140 Wash. 2d 35, 43, 992 P.2d 1002, 1006 (2000).

17. WASH. REV. CODE § 51.32.090(1).

18. WASH. REV. CODE § 51.32.090(3)(a), (4)(a); *Hubbard*, 140 Wash. 2d at 43, 992 P.2d at 1006 ("A claimant's right to temporary total disability benefits (time loss payments) terminates when the claimant's earning power, at any kind of work, is restored to that existing at the time of the occurrence of the injury, or when the claimant's claim is closed. Temporary total disability benefits also terminate when the claimant is able to earn a wage at any kind of reasonably continuous and generally available employment.").

19. WASH. REV. CODE § 51.32.090(3); *Hubbard*, 140 Wash. 2d at 43, 992 P.2d at 1006.

20. *Double D Hop Ranch*, 133 Wash. 2d at 798, 947 P.2d 729; see also *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wash. 2d 222, 230, 883 P.2d 1370, 1375 (1994) (describing "earning capacity" during disability period as "future" earning capacity).

21. WASH. REV. CODE § 51.32.090(7) (2000) (referring to WASH. REV. CODE § 51.08.018).

22. WASH. REV. CODE § 51.14.010 (2000) ("Every employer under this title shall secure the payment of compensation under this title by: (1) Insuring and keeping insured the payment of such benefits with the state fund; or (2) Qualifying as a self-insurer under this title.").

employers²³ pay premiums into the State Industrial Insurance Fund²⁴ (State Fund) based upon the degree of hazard involved in their occupation.²⁵ The Department of Labor and Industries (Department) then makes the appropriate amount of payment to the injured worker. In comparison, "self-insured" employers pay for benefits out of their own assets and may reinsure up to 80% of their liability.²⁶

II. APPROACHES TO DEFINING WAGES

The definition of "wages" is an important component of workers' compensation statutes because the amount of benefits received by a worker is based upon the worker's wages at the time of injury. There is a variety of wage definitions. Most statutes define "wages" to re-

23. See WASH. REV. CODE § 51.08.173 (2000) ("Self-insurer" means an employer or group of employers which has been authorized under this title to carry its own liability to its employees covered by this title.").

24. WASH. REV. CODE § 51.08.175 (2000). The State Fund consists of the accident and medical aid funds. WASH. REV. CODE §§ 51.44.010, .020 (2000); See also SCHARF & HOCHBERG, *supra* note 3, § 59.6 (describing the accident and medical aid funds). "Washington is one of only six states that use an exclusive state fund to provide workers' compensation insurance to employers." JOINT LEGISLATIVE AUDIT & REVIEW COMM., WORKERS' COMPENSATION SYSTEM PERFORMANCE AUDIT REPORT 98-9, at 11 (Dec. 1998), available at <http://jlarc.leg.wa.gov/Reports/98-9WorkComp.PDF> [hereinafter AUDIT REPORT]. "The other jurisdictions with exclusive state funds are Nevada, North Dakota, Ohio, West Virginia, and Wyoming. Nevada [was] scheduled to allow private insurance beginning in 1999." *Id.* at 11 n.1. Because Washington "does not allow private carriers to participate in workers' compensation insurance . . . [T]he costs are spread only between two groups: the State, and self-insurers." *Weyerhaeuser Co. v. Tri*, 117 Wash. 2d 128, 136, 814 P.2d 629, 633 (1991) (citation omitted).

25. See WASH. REV. CODE § 51.16.035(1) (2000) ("The department shall classify all occupations or industries in accordance with their degree of hazard and fix therefore basic rates of premium which shall be the lowest necessary to maintain actuarial solvency of the accident and medical aid funds in accordance with recognized insurance principles . . .").

26. WASH. REV. CODE § 51.14.020 (2000), which provides:

(1) An employer may qualify as a self-insurer by establishing to the director's satisfaction that he or she has sufficient financial ability to make certain the prompt payment of all compensation under this title and all assessments which may become due from such employer. Each application for certification as a self-insurer submitted by an employer shall be accompanied by payment of a fee of one hundred fifty dollars or such larger sum as the director shall find necessary for the administrative costs of evaluation of the applicant's qualifications. Any employer who has formerly been certified as a self-insurer and thereafter ceases to be so certified may not apply for certification within three years of ceasing to have been so certified.

.....

(5) A self-insurer may reinsure a portion of his or her liability under this title with any reinsurer authorized to transact such reinsurance in this state: PROVIDED, That the reinsurer may not participate in the administration of the responsibilities of the self-insurer under this title. Such reinsurance may not exceed eighty percent of the liabilities under this title.

flect a worker's "actual earnings."²⁷ However, there is a split of authority regarding whether wages encompass fringe benefits such as employer-provided health insurance.²⁸

A. *The Federal Approach: Morrison-Knudsen*

The leading federal case is the decision of the United States Supreme Court in *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*.²⁹ *Morrison-Knudsen* involves the calculation of compensation for the family of James Hilyer, who was struck and killed by a cement truck while helping to build the District of Columbia Metrorail System. At issue was whether the decedent's wage basis should include 68 cents consisting of per-hour value paid into the union health and welfare fund, pension fund, and training fund.³⁰ The Court construed the following "wages" clause in the 1927 Longshore and Harbor Workers' Compensation Act (LHWCA):

"Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.³¹

Based upon its interpretation of the "wages" clause, the Court held that employer contributions to union trust funds for health and welfare, pensions, and training were not wages for the purpose of calculating compensation benefits under LHWCA.³²

The *Morrison-Knudsen* Court stated that the value of the employer's contributions was too difficult to ascertain and was therefore not of "similar advantage" to board, rent, housing, or lodging, which

27. Professor Larson suggests that a worker's "actual earnings" include wages and any other item received as consideration for the work constituting real economic gain to the worker such as tips, bonuses, commissions, and room and board. 5 LARSON, *supra* note 4, § 93.01(2)(a), at 93-17 to -18.

28. See *id.* § 93.01D(2)(b), at D93-62 to -70 (surveying cases by jurisdiction). Fringe benefits have been a part of modern industry in America since employers began offering a variety of health insurance plans in addition to regular wages. KENNETH R. WING ET AL., *THE LAW AND AMERICAN HEALTH CARE* 14-18 (1998). Therefore, when the Legislature enacted RCW 51.08.178 in 1971, health insurance was a significant employee benefit. See RASHI FEIN, *MEDICAL CARE, MEDICAL COSTS* 23 (1986) (stating that by 1951, 77 million people were covered by health insurance).

29. 461 U.S. 624 (1983).

30. *Id.* at 627-28.

31. *Id.* at 629 (quoting 33 U.S.C. § 902(13) (1972) (incorporated into the District of Columbia Workmen's Compensation Act)).

32. *Id.* at 637. Chief Justice Burger wrote the majority opinion.

have a present value readily converted into a cash equivalent.³³ In deciding that the contributions could not be so converted, the Court found that the employer's cost of maintaining the trust funds was irrelevant because there was no direct relation between the size of the contributions and the size of the decedent's benefits or pension credits.³⁴ The Court emphasized that Hilyer was too far removed from the benefits because his interest in them was speculative.³⁵

The *Morrison-Knudsen* Court then consulted legislative history, finding no evidence indicating that Congress intended wages to include employer contributions to benefits plans.³⁶ The Court recognized that fringe benefits were a common feature in America, but found that Congress's exclusion of these benefits in the originally enacted and revised versions of LHWCA was illustrative of Congressional intent to exclude such benefits from the Act's wage definition.³⁷ In contrast, Congress added fringe benefits to the definition of "wages" in other statutory schemes.³⁸

The Court further noted that LHWCA uses the concept of "wages" in several ways.³⁹ Therefore, to maintain consistency throughout LHWCA, the expanded concept of "wages" would have to be adopted in calculating the "national average weekly wage," which forms the basis for arriving at the overall maximum weekly benefit figure.⁴⁰ The Court, however, found that this calculation would be extremely difficult.⁴¹

Finally, the *Morrison-Knudsen* Court noted that the Department of Labor consistently excluded fringe benefits from wages.⁴² Although the agency's interpretation was not controlling, the agency was entitled to deference since it was charged with the enforcement and interpretation of LHWCA.⁴³ The Court emphasized that any reinterpretation of LHWCA's wage definition would significantly alter the balance achieved by Congress between employers and workers.⁴⁴ The Court explained that expanding the definition would undermine the goal of

33. *Id.* at 630.

34. *Id.* at 630-31.

35. *Id.* at 631.

36. *Id.* at 632-33.

37. *Id.* at 632.

38. *Id.* at 632-33 (citing Davis-Bacon Act, 40 U.S.C. § 276a).

39. *Id.* at 633 (citing provisions related to calculating disability and survivors' benefits).

40. *Id.* at 634-35. The federal scheme is similar to Washington's "average monthly wage" formula in RCW 51.08.018.

41. *Morrison-Knudsen*, 461 U.S. at 634.

42. *Id.*

43. *Id.* at 635.

44. *Id.* at 636.

providing prompt compensation to injured workers because the wage-calculation formula, which was almost never a source of controversy, would become a focus of dispute in almost every case.⁴⁵

In dissent, Justice Marshall argued that the term "wages," as used in LHWCA, includes the employer's contributions to union trust funds for health and welfare, pensions, and training.⁴⁶ Justice Marshall dismissed the majority's concern over the uncertainty about the precise value of a given benefit, stating, "The trust funds obviously have *some* value for employees and simply to exclude them from consideration is hardly an appropriate response to uncertainty about their precise value. In addition, the statute itself calls only for inclusion of 'the *reasonable* value' of non-cash items . . ."⁴⁷ Justice Marshall argued that LHWCA focused on a worker's loss of earning power as a result of an industrial injury, which did not permit a distinction between direct cash payments and payments into a plan that provides benefits to the worker.⁴⁸ Consequently, wages should include benefits because they represent a portion of the worker's earning power.⁴⁹

B. Other Approaches

In addition to the United States Supreme Court, various state appellate courts have considered whether wages should include fringe benefits such as health insurance. Many states have recognized that health insurance is a fringe benefit and have excluded such insurance from an injured worker's wage basis for calculating workers' compensation.⁵⁰ Other states, however, have concluded that wages include fringe benefits. These courts, like the *Cockle* majority, tend to follow the reasoning of Justice Marshall's dissent in *Morrison-Knudsen* that it

45. *Id.* at 637.

46. *Id.* at 638 (Marshall, J., dissenting).

47. *Id.* at 642 (Marshall, J., dissenting) (citing 33 U.S.C. § 902(13) (1972)).

48. *Id.* at 640-41 (Marshall, J., dissenting).

49. *Id.* at 641 (Marshall, J., dissenting).

50. See *Theuer v. Labor & Indus. Review Comm'n*, 624 N.W.2d 110 (Wis. 2001); *Anderson v. Baptist Med. Ctr.*, 541 S.E.2d 526 (S.C. 2001); *Groover v. Johnson Controls World Serv.*, 527 S.E.2d 639 (Ga. Ct. App. 2000); *Lazarus v. Indus. Comm'n of Arizona*, 947 P.2d 875 (Ariz. Ct. App. 1997); *Pascarella v. Moliterno Stone Sales, Inc.*, 689 A.2d 1132 (Conn. App. Ct. 1997), *cert. denied*, 692 A.2d 1282 (Conn. 1997); *Pluto v. Illinois Indus. Comm'n*, 650 N.E.2d 631 (Ill. App. Ct. 1995); *Pollard v. Knox County*, 886 S.W.2d 759 (Tenn. 1994); *Borofsky's Case*, 582 N.E.2d 538 (Mass. 1991); *Antillon v. New Mexico State Highway. Dep't*, 820 P.2d 436 (N.M. Ct. App. 1991); *Tabor v. Levi Strauss & Co.*, 801 S.W.2d 311 (Ark. Ct. App. 1990); *Linton v. City of Great Falls*, 749 P.2d 55 (Mont. 1988); *Nelson v. SAIF Corp.*, 731 P.2d 429 (Or. 1987); *Gajan v. Bradlick Co.*, 355 S.E.2d 899 (Va. Ct. App. 1987); *Rainey v. Mills*, 733 S.W.2d 756 (Ky. Ct. App. 1987); *Wengler v. Druggists Mut. Ins. Co.*, 616 S.W.2d 859 (Mo. Ct. App. 1981).

is harsh to ignore fringe benefits because they are an important part of a worker's earning power.⁵¹ Still other states have made the inclusion of fringe benefits depend upon the statutory language itself⁵² or whether they are "vested."⁵³

Some commentators have extensively analyzed the issue of fringe benefits as part of wages. For example, Professor Arthur Larson, author of a leading treatise on workers' compensation law, observed:

Workers' compensation has been in force in the United States for over seventy years, and fringe benefits have been a common feature of American industrial life for most of that period. Millions of compensation benefits have been paid during this time. Whether paid voluntarily or in contested and adjudicated cases, they have always begun with a wage basis calculation that made "wage" mean the "wages" that the worker lives on and not miscellaneous "values" that may or may not someday have a value to him or her depending on a number of uncontrollable contingencies. Before a single court takes it on itself to say, "We now tell you, although you didn't know it, you have all been wrongly calculating wage basis in these millions of cases, and so now, after seventy years, we are pleased to announce that we have discovered the true meaning of 'wage' that somehow eluded the rest of you for seven decades," that court would do well to undertake a much more penetrating analysis than is visible in the Circuit Court's opinion in *Hilyer* of why this revelation was denied to everyone else for so long.⁵⁴

In essence, Professor Larson warned against the expansion of wages to include fringe benefits, such as health insurance, because such benefits fundamentally differ from board, housing, and fuel.⁵⁵

51. See *Ashby v. Rust Eng'g Co.*, 559 A.2d 774 (Me. 1989); *Ex parte Murray*, 490 So. 2d 1238, 1240-41 (Ala. 1986); *Ragland v. Morrison-Knudsen Co.*, 724 P.2d 519, 521 (Alaska 1986); *Meeker v. Provenant Health Partners*, 929 P.2d 26, 29 (Colo. Ct. App. 1996).

52. See, e.g., *Ex parte Murray*, 490 So. 2d at 1240 (holding Alabama statute's definition of "wages," which includes "allowances of any character," was broad enough to encompass employer-provided health insurance in the computation of "average weekly wage").

53. See, e.g., *Munroe Reg'l Med. Ctr. v. Ricker*, 489 So. 2d 785 (Fla. Dist. Ct. App. 1986) (overturning a decision including in the calculation of the claimant's average weekly wage the value of social security taxes, vacation benefits and sick leave benefits because none or these benefits had vested). But see *Jess Parrish Mem'l Hosp. v. Ansell*, 390 So. 2d 1201 (Fla. Dist. Ct. App. 1980) (holding that the value of group health insurance premiums were includable in the determination of the claimant's average weekly wage because her injuries were such to make the benefit vest).

54. 5 LARSON, *supra* note 4, § 93.01(2)(b), at 93-20.

55. Professor Larson is also a primary author of the Model Act for Workers' Compensation, which includes in wages the "reasonable value of board, rent, housing, lodging, fuel or similar advantage received from the employer." 10 LARSON, *supra* note 4, at App. F-9, F-14.

C. Washington's Statutory Approach

Like LHWCA, Washington's IIA enumerates, as part of wages, in-kind components furnished by an employer. Nevertheless, Washington courts have been reluctant to follow other jurisdictions because IIA is unique.⁵⁶ The courts have favored a broad construction of IIA's provisions, including the definition of "wages."⁵⁷

For the purposes of IIA, RCW 51.08.178 provides, "The term 'wages' shall include the reasonable value of board, housing, fuel or *consideration of like nature* received from the employer as part of the contract of hire"⁵⁸ In essence, the statute creates three categories of consideration: (1) board, housing, and fuel; (2) "other consideration of like nature" to board, housing, and fuel; and (3) other consideration not "of like nature" to board, housing, and fuel. Washington courts have interpreted the phrase "consideration of like nature" to include consideration furnished *in cash*.⁵⁹ Prior to *Cockle*, however, the courts had not determined which consideration furnished *in kind* (i.e., non-cash work benefits) other than board, housing, and fuel are part of wages.

III. THE WASHINGTON SUPREME COURT DECISION IN *COCKLE*

In *Cockle*, the Washington Supreme Court held, for the first time, that the value of health care premiums paid by the employer should be included in the basis used to determine workers' compensation payments under IIA.⁶⁰

56. See *Stertz v. Indus. Ins. Comm'n.*, 91 Wash. 588, 604, 158 P. 256, 262 (1916) (stating that to seek authority in the decisions of other states is useless because other workers' compensation statutes have no resemblance to IIA).

57. See *Dennis v. Dep't of Labor & Indus.*, 109 Wash. 2d 467, 470, 745 P.2d 1295, 1297 (1987) (stating that IIA is to be liberally construed and citing cases both predating and postdating the 1971 codification of this principle).

58. WASH. REV. CODE § 51.08.178(1) (2000) (emphasis added).

59. See *Fred Meyer, Inc. v. Shearer*, 102 Wash. App. 336, 340, 8 P.3d 310, 312 (2000) (holding that Shearer's monthly wages should include hours for which she was paid holiday, sick, vacation, and funeral benefits because these benefits are not in-kind consideration but rather are payments in cash), *review denied*, 143 Wash. 2d 1003, 21 P.3d 290 (2001); *Rose v. Dep't Labor & Indus.*, 57 Wash. App. 751, 758, 790 P.2d 201, 205 (holding that \$1 per day was consideration for the work done by a prison inmate because wages includes "any and all forms of consideration received by the employee from the employer in exchange for work performed."), *review denied*, 115 Wash. 2d 1010, 797 P.2d 512 (1990).

60. *Cockle*, 142 Wash. 2d at 823, 16 P.3d at 594.

A. Facts

In November 1994, Dianne Cockle was injured while working for the Pierce County Rural Library District (District).⁶¹ Under her employment contract, Cockle was paid \$5.61 per hour plus medical and dental benefits.⁶² The parties stipulated that the value of her health care coverage was \$205.52 per month.⁶³

Initially, Cockle was eligible for time-loss benefits because she was unable to work.⁶⁴ Once she was able to return to work on a part-time basis, she was entitled to loss of earning power benefits.⁶⁵ Because she was unable to work the minimum hours required under the District's health care program, Cockle's medical and dental benefits were suspended.⁶⁶ The Department then calculated her workers' compensation payments based solely upon her paycheck at the time of injury, excluding consideration of her loss of health care coverage.⁶⁷

The Board of Industrial Insurance Appeals (Board) affirmed the Department's order.⁶⁸ Both the superior court and the court of appeals found, however, that Cockle's health insurance represented "other consideration of like nature received from the employer as part of the contract of hire," and therefore should have been included in the calculation of her wages.⁶⁹ The Washington Supreme Court agreed, but modified the court of appeals's method of calculating the "reasonable value" of Cockle's health care coverage and remanded the case to the Department for recalculation of her compensation.⁷⁰

61. *Id.* at 805, 16 P.3d at 585.

62. *Id.* Cockle's employment contract also provided vacation benefits valued at \$28.92 a month. Appellant's Brief, *supra* note 11, at 5. Although the issue of whether vacation benefits are included in wages was litigated below, the parties did not appeal the issue nor did the Washington Supreme Court address it. *Cockle*, 142 Wash. 2d at 805 n.1, 16 P.3d at 585 n.1.

63. Supplemental Brief of Petitioner at 1-2, *Cockle v. Dep't of Labor & Indus.*, 142 Wash. 2d 801, 16 P.3d 583 (2000) (No. 68539-8).

64. *Cockle*, 142 Wash. 2d at 806, 16 P.3d at 585 (citing WASH. REV. CODE § 51.32.090(1)).

65. *Id.* (citing WASH. REV. CODE § 51.32.090(3)(a)(ii)).

66. *Id.*

67. *Id.* The Department calculated Cockle's time-loss rate to be \$362.46. To arrive at that figure, the Department multiplied her monthly wage (\$510.51) by 0.71 based on her status as a married person with three dependents pursuant to RCW 51.32.090(1) and 51.32.060(1)(d). The Department, however, miscalculated those figures. It conceded that the correct monthly wage was \$987.36 and the time loss \$701.03. Appellant's Brief, *supra* note 11, at 4.

68. *Cockle*, 142 Wash. 2d at 806, 16 P.3d at 585.

69. *Id.* (quoting WASH. REV. CODE § 51.08.178(1)).

70. *Id.* at 823, 16 P.3d at 594.

B. The Legal Argument in Cockle

The primary issue before the Washington Supreme Court was whether the value of employer-provided health insurance should be included in the basis used to calculate workers' compensation payments under IIA.⁷¹ Because RCW 51.08.178 expands the "'ordinary' dictionary meaning of 'wages,' . . . to include the 'reasonable value' of in-kind work benefits such as 'board, housing, [and] fuel,'" ⁷² the court's analysis focused on the "critical" phrase "other consideration of like nature."⁷³ IIA, however, does not identify which in-kind work benefits are "of like nature" to board, housing, and fuel. Specifically, IIA does not indicate whether the term "wages" is meant to encompass employer-provided benefits such as medical and dental benefits. Therefore, the court needed to determine whether the Legislature intended health insurance to be part of the wage definition in RCW 51.08.178.

The parties offered different arguments about which characteristic shared by board, housing, and fuel should determine the scope of "other consideration of like nature." Cockle emphasized the in-kind nature of board, housing, and fuel as the unifying characteristic. She claimed (1) that IIA's purpose is to minimize a worker's suffering and economic loss by providing for disability compensation based upon lost wage earning capacity; (2) that the worker's "earning capacity" must necessarily include all payments that the worker was receiving, in cash or in kind, at the time of injury; and (3) that board, housing, and fuel are common examples of wage payments in kind.⁷⁴ Therefore, Cockle insisted that the Legislature intended "to give 'wages' a practical, flexible meaning" by refusing to exclude employment compensation simply because it is paid in a form other than money.⁷⁵

On the other hand, the Department argued that health insurance is not "consideration of like nature" to board, housing, and fuel. Expanding upon *Morrison-Knudsen's* analysis, the Department reasoned that unlike health insurance, board, housing, and fuel are (1) "tangible goods and direct services," (2) "valued by determining the market value of the goods and services actually consumed by the worker," (3) consumed "on a daily basis," (4) provided by the employer "to make the worker more readily accessible to work, or as a special incentive,"

71. *Id.* at 805, 16 P.3d at 584 (citing WASH. REV. CODE § 51.08.178).

72. *Id.* at 808, 16 P.3d at 586.

73. *Id.*

74. Supplemental Brief of Respondent at 7-14, *Cockle v. Dep't of Labor & Indus.*, 142 Wash. 2d 801, 16 P.3d 583 (2000) (No. 68539-8).

75. *Id.* at 11.

(5) often used by employers to offset money wages, and (6) "generally taxable by the [Internal Revenue Service]." ⁷⁶ For these reasons, the Department asserted that it has long excluded employer-provided health insurance from its computation of workers' compensation and that the Legislature acquiesced by not modifying the phrase "other consideration of like nature." ⁷⁷

In addition, the Department stated a number of policy reasons for excluding employer-provided health insurance from the definition of "wages." First, expanding wages to encompass health benefits would permit double recovery where such benefits are continued during the disability period. ⁷⁸ Second, including medical and dental benefits in IIA's definition of "wages" would make workers' compensation costly, burdensome, and time-consuming rather than prompt, sure, and certain. ⁷⁹ Finally, the Department warned of a potential "flood of litigation" over which modern benefits should be included in the term "wages" under RCW 51.08.178. ⁸⁰

Considering these arguments, the Washington Supreme Court held that Cockle's wages included her employer-provided health insurance. ⁸¹ The court reasoned that medical and dental benefits are "consideration of like nature" to "board, housing, [and] fuel" in that such benefits represent "readily identifiable and reasonably calculable in-kind component[s of a worker's] lost earning capacity at the time of injury that is critical to protecting workers' basic health and survival." ⁸²

C. The Majority and Minority Opinions

In analyzing whether employer-provided health insurance should be included in the term "wages" under RCW 51.08.178, the Washington Supreme Court considered principles of statutory construction, legislative history, and relevant case law. The *Cockle* majority and

76. Supplemental Brief of Petitioner, *supra* note 63, at 7–8.

77. *Id.* at 4. The Department contended:

For nearly 30 years, the Department has interpreted RCW 51.08.178 as not including health insurance in "monthly wage." The Legislature has amended the statute four times over the past 28 years and has not changed the statute to include health insurance. The Legislature has thus acquiesced to the Department's construction of the statute.

Id.

78. *Id.* at 12.

79. *Id.* at 17.

80. Supplemental Brief of Petitioner, *supra* note 63, at 17 ("As the *Morrison-Knudsen* Court explained, . . . such a flood of litigation makes the compensation process anything but prompt, sure or certain.").

81. *Cockle*, 142 Wash. 2d at 805, 16 P.3d at 584.

82. *Id.* (quoting WASH. REV. CODE § 51.08.178(1)).

dissent used the same standards to arrive at decidedly different views of wages.

1. The Statutory Analysis

The *Cockle* majority began its analysis by referring to the definition of "wages" in RCW 51.08.178(1).⁸³ Citing *Dennis v. Department of Labor & Industries*,⁸⁴ the majority found that the term "wages" should not be given its ordinary meaning because the Legislature manifested a contrary intent to include the reasonable value of certain in-kind benefits.⁸⁵ The majority further found that the wage definition was ambiguous because the definition does not specify what qualifies as "other consideration of like nature" and the parties proposed equally reasonable interpretations.⁸⁶

Once a Washington court determines that a statute is ambiguous, the court may resort to canons of statutory construction to give meaning to the legislative action.⁸⁷ *Ejusdem generis* is a well-established rule of statutory construction, providing "when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed."⁸⁸ Applying the *ejusdem generis* rule, the majority found that the Legislature's specific choice of words ruled out both exceedingly narrow and exceedingly broad readings of the phrase "consideration of like nature."⁸⁹ The majority reasoned:

The Legislature here decided *against* restricting qualifying benefits to a closed list of enumerated items. It also chose the word "consideration," a term understood broadly in the law and used in the definition of "wages" in the workers' compensation acts of few, if any, other jurisdictions. On the other hand, it did not mandate inclusion in "wages" of "any other consideration," but rather of "other consideration of like nature," suggesting that a more limited *ejusdem generis* construction was intended.⁹⁰

83. *Id.* at 807, 16 P.3d at 585.

84. 109 Wash. 2d 467, 479–80, 745 P.2d 1295, 1302 (1987).

85. *Cockle*, 142 Wash. 2d at 808, 16 P.3d at 586.

86. *Id.*

87. See Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 SEATTLE U. L. REV. 179, 192–99 (2001).

88. BLACK'S LAW DICTIONARY 535 (7th ed. 1999); *Simpson Inv. Co. v. State*, 141 Wash. 2d 139, 156–57, 3 P.3d 741, 750 (2000) ("In other words, the precise terms modify, influence or restrict the interpretation or application of the general terms where both are used in sequence or collocation in legislative enactments.").

89. *Cockle*, 142 Wash. 2d at 808–10, 16 P.3d at 586–87.

90. *Id.* at 809–10, 16 P.3d at 587.

Therefore, while it did not enumerate all qualifying benefits, the Legislature expressly mandated inclusion of the "reasonable value" of all "consideration of like nature received from the employer as part of the contract of hire" in the calculation of an injured worker's "wages."⁹¹

In contrast, the dissent argued that the plain language of RCW 51.08.178 excludes employer-provided health insurance from wages because the Legislature specifically referenced various forms of *compensation* as opposed to fringe benefits.⁹² The dissent recognized that the Legislature referenced board, housing, and fuel in the statute. But the dissent noted that these items are typically associated with workers traveling or living somewhere other than their usual residence at the employer's request.⁹³ According to the dissent, the phrase "other consideration of a like nature" corresponds better to these circumstances.⁹⁴ Therefore, the dissent concluded that the words used by the Legislature did not include so-called "core, nonfringe benefits" such as health insurance.⁹⁵

Furthermore, the dissent found that the interplay between the statutory provision defining the "average monthly wage" and Washington's Employment Security Act⁹⁶ illustrates legislative intent to exclude employer-provided health insurance from IIA's definition of "wages."⁹⁷ The dissent reasoned: "It would seem exceedingly anomalous for the Legislature to include benefits within the definition of wages under the Act and yet cap the calculation of wages for purposes of time loss payments by a figure that expressly *excludes* the payment of such benefits."⁹⁸ The dissent found the majority's analysis as implying that the definition of "wages" for time-loss benefits in RCW

91. *Id.* at 810 n.4, 16 P.3d at 587 n.4 (citing WASH. REV. CODE § 51.08.178).

92. *Id.* at 826–27, 16 P.3d at 595–96 (Talmadge, J., dissenting).

93. *Id.* at 826, 16 P.3d at 595–96 (Talmadge, J., dissenting).

94. *Id.*

95. *Id.* at 831, 16 P.3d at 598 (Talmadge, J., dissenting). Justice Talmadge noted that, since 1971, the Legislature has not compensated Washington workers by adding their medical and dental coverage to the definition of "wages" in RCW 51.08.178. *Id.* at 827 n.1, 16 P.3d at 596 n.1. Chief Justice Guy, in his concurrence in dissent, also articulated this view. *Id.* at 835–36, 16 P.3d at 600 (Guy, C.J., concurring in dissent).

96. WASH. REV. CODE § 50.04.355 (2000).

97. *Id.* at 827, 16 P.3d at 596 (Talmadge, J., dissenting). Under IIA, time loss is paid pursuant to RCW 51.32.090. The calculation of time-loss compensation is derived from RCW 51.32.060. While an injured worker is entitled to be paid a portion of his or her wages, the benefits received by the worker are capped on the basis of the "average monthly wage." Washington's "average monthly wage" is defined in RCW 51.08.018, which references the Employment Security Act (ESA), chapter 50.04 of RCW. The ESA, in turn, specifically exempts from the definition of "wages" various fringe benefits. WASH. REV. CODE § 50.04.330 (2000).

98. *Cockle*, 142 Wash. 2d at 827, 16 P.3d at 596 (Talmadge, J., dissenting).

51.08.178 might not extend to other IIA provisions.⁹⁹ IIA, however, does not distinguish between time-loss, pension, or death benefits.¹⁰⁰ Therefore, the dissent stressed that the majority did not provide a clear standard as to whether “core, nonfringe benefits” are recoverable when a worker or a worker’s beneficiary receives a pension or death benefits.¹⁰¹

2. The Legislative History Analysis

The *Cockle* majority next consulted IIA’s legislative history, which in the majority’s view decisively confirmed its interpretation that wages include employer-provided health insurance.¹⁰² Since IIA’s enactment in 1911, compensation rates had been legislatively fixed.¹⁰³ The 1971 Amendments to IIA added a “wages” section to its definitional chapter and made compensation proportional to a worker’s actual earnings at the time of injury.¹⁰⁴ Furthermore, the Legislature provided a liberal construction mandate.¹⁰⁵ The majority reasoned that, taken together, the perceived benefits of the 1971 Amendments and the liberal construction mandate showed legislative intent to include in wages the reasonable value of such in-kind work benefits as health insurance.¹⁰⁶

In addition, the *Cockle* majority was not persuaded by the Department’s argument that logical inferences from other IIA provisions show legislative intent to exclude benefits from the definition of “wages” in RCW 51.08.178(1).¹⁰⁷ For example, in the majority’s

99. *Id.* at 832, 16 P.3d at 598–59 (Talmadge, J., dissenting).

100. *Id.* at 832, 16 P.3d at 598 (Talmadge, J., dissenting).

101. *Id.* at 832 n.4, 16 P.3d at 598 n.4 (Talmadge, J., dissenting).

102. *Id.* at 811–14, 16 P.3d at 587–89.

103. *Id.* at 810, 16 P.3d at 587.

104. *Id.* (citing WASH. REV. CODE § 51.08.178(1) (2000); Laws of 1971, 1st Ex. Sess., ch. 289, § 14.).

105. WASH. REV. CODE § 51.12.010 (2000) (“This Title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.”).

106. *Cockle*, 142 Wash. 2d at 810–11, 16 P.3d at 587. The majority said:

This change had at least three perceived benefits. First, the change will assure a more equitable and realistic basis for compensation. Second, the change will have an incentive effect of reducing the number of cases where time-loss benefits exceed the wages that would otherwise have been earned. Third, compensation levels would automatically keep pace with wages increases, making it unnecessary to go to the legislature with hat in hand each time a benefit increase is sought.

Id. (citations and internal quotation marks omitted).

107. *Id.* at 813, 16 P.3d at 588–89. The Department stated that some IIA provisions have capped monthly compensation at levels between 100% and 150% of the state’s “average monthly wage,” as defined in RCW 51.08.018. Supplemental Brief of Petitioner, *supra* note 63, at 9. See WASH. REV. CODE § 51.32.050(3), (5) (2000) (death-based pension); WASH. REV. CODE § 51.32.060(5) (2000) (permanent total disability pension); WASH. REV. CODE §

view, IIA's reference to the "average annual wage" in Title 50 of RCW did not clarify whether the 1971 Legislature intended employer-provided health insurance to be included in the wage definition.¹⁰⁸ Similarly, the majority found that RCW 51.32.090(4)(c) does not logically support excluding benefits from wages merely because "the Legislature, after hearing from various interest groups, chose to require employers to reinstate the preexisting health benefits of workers suffering temporary partial disability."¹⁰⁹

In contrast, the dissent asserted that the Legislature imported a traditional view of wages into IIA.¹¹⁰ When the Legislature enacted IIA in 1911, a person who performed services without payment of wages constituted a volunteer and was not covered under the Act.¹¹¹ The dissent discerned that wages, as part of the traditional coverage determination under IIA, evidences legislative intent to exclude employer-provided health insurance for the purpose of computing workers' compensation payments.¹¹²

3. The Case Law Analysis

The *Cockle* majority reasoned that Washington case law supports the statutory mandate that the reasonable value of in-kind benefits similar to board, housing, and fuel be included in the wage definition under RCW 51.08.178.¹¹³ In support of this proposition, the majority quoted *Dennis v. Department of Labor & Industries*¹¹⁴:

51.32.090(3)(a)(ii) (2000) (combined payments for payments of temporary partial disability benefits and wages); WASH. REV. CODE § 51.32.090(7) (2000) (temporary total disability benefits). According to the Department, "our Legislature has demonstrated that the 'state average wage' for purposes of RCW Title 51, like the 'national average weekly wage' in *Morrison-Knudsen*, does not include fringe benefits." Supplemental Brief of Petitioner, *supra* note 63, at 9.

108. *Cockle*, 142 Wash. 2d at 814, 16 P.3d at 589.

109. *Id.* RCW 51.32.090(4)(c) mandates that "any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury." The Department argued the statute shows legislative recognition "that wage-based disability benefits do not include, in the computation of the 'monthly wage,' a value reflecting 'health and welfare benefits that the worker received on the job before the injury.'" Supplemental Brief of Petitioner, *supra* note 63, at 10 (quoting House Bill Report of HB 1246). The majority disagreed and held that the statute "means that restoration of a recovering workers' preexisting health benefits reduces the 'actual difference between the worker's present wages and earning power at the time of injury' under RCW 51.32.090(3)(a)(ii), mitigating the loss of earning power accordingly." *Cockle*, 142 Wash. 2d at 814, 16 P.3d at 589 (quoting WASH. REV. CODE § 51.32.090(3)(a)(ii)) (2000).

110. *Cockle*, 142 Wash. 2d at 828, 16 P.3d at 596 (Talmadge, J., dissenting).

111. *Id.* (quoting Laws of 1911, ch. 74, § 3 at 348; and WASH. REV. CODE § 51.12.035(1) (2000)).

112. *Id.*

113. *Id.* at 811-12, 16 P.3d at 587-88.

114. 109 Wash. 2d 467, 745 P.2d 1295 (1987).

[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.¹¹⁵

The majority also noted that in *Double D Hop Ranch v. Sanchez*,¹¹⁶ the Washington Supreme Court held that an injured worker should be compensated based upon his or her actual "lost earning capacity" rather than on an arbitrarily set figure.¹¹⁷ Therefore, the majority declared that Cockle was capable, at the time of her injury, of earning her hourly wages plus full health care coverage.¹¹⁸

Although the Legislature left the language of RCW 51.08.178 unaltered despite the Department's interpretation of "wages" as excluding health insurance, the *Cockle* majority declined to follow that interpretation.¹¹⁹ The majority asserted that an agency's interpretation is not binding on the Washington Supreme Court, but did not address the Department's argument about legislative acquiescence.¹²⁰ The majority simply reasoned that "legislative acquiescence can never be interpreted as permission to ignore or violate statutory mandates."¹²¹ The majority concluded that the Department's interpretation could not be reconciled with IIA's liberal construction mandate.¹²²

Finally, the majority found that the Department relied too heavily on *Morrison-Knudsen* for the proposition that employer-provided health insurance is a fringe benefit and should not be included in a statutory definition of "wages."¹²³ Although the *Morrison-Knudsen* Court was also under a mandate to liberally construe LHWCA, the majority agreed with the Court of Appeals in *Cockle*¹²⁴ that the federal

115. *Cockle*, 142 Wash. 2d at 811, 16 P.3d at 587 (quoting *Dennis v. Dep't of Labor & Indus.*, 109 Wash. 2d 467, 470, 745 P.2d 1295, 1297 (1987)).

116. 133 Wash. 2d 793, 947 P.2d 727 (1997).

117. *Cockle*, 142 Wash. 2d at 811, 16 P.3d at 588 (citing *Double D Hop Ranch*, 133 Wash. 2d at 798).

118. *Id.* at 811, 16 P.3d at 588.

119. *Id.* at 811-12, 16 P.3d at 588.

120. *Id.* at 812, 16 P.3d at 588 (citing *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash. 2d 38, 46, 959 P.2d 1091, 1094 (1998) ("We accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute.")).

121. *Id.* at 812, 16 P.3d at 588; *cf. Dep't of Labor & Indus. v. Landon*, 117 Wash. 2d 122, 127, 814 P.2d 626, 628 (1991) (finding that, although the Department claimed that the Legislature acquiesced, the Department presented no evidence that its interpretation had actually attracted the Legislature's attention before the amendment).

122. *Cockle*, 142 Wash. 2d at 812, 16 P.3d at 588 (citing WASH. REV. CODE § 51.12.010 (2000)).

123. *Id.* at 815, 16 P.3d at 590.

124. The court of appeals stated:

case conflicted with Washington law.¹²⁵ The majority also noted that other jurisdictions criticized and distinguished *Morrison-Knudsen*.¹²⁶ Therefore, the majority likewise declined to follow the *Morrison-Knudsen* reasoning.¹²⁷

The dissent offered a different case law analysis to buttress its interpretation of RCW 51.08.178. Although the definition of "wages" gained more significance when the 1971 amendments created the present statutory scheme for payment of time-loss benefits, the dissent found that wages were a part of coverage determinations under IIA from its inception in 1911.¹²⁸ For example, the dissent cited *Kirk v. Department of Labor & Industries*¹²⁹ for the proposition that coverage under IIA is generally determined by a worker's receipt of wages.¹³⁰ The dissent also relied upon a Washington State Attorney General opinion that involved student nurses from the University of Washington who served for a six-week training period at the Firland Sanitarium.¹³¹ Although they remained students and did not receive a definite wage, the student nurses received room, board, and fuel as remuneration for their services.¹³² The dissent found that eligibility for coverage under IIA, with respect to room, board, and other similar types of compensation, was designed to address peripatetic employees like the student nurses at Firland Sanitarium.¹³³ The dissent therefore concluded that the Legislature never contemplated that benefits would be part of the wage definition under RCW 51.08.178.¹³⁴

The LHWCA, according to the *Morrison-Knudsen* Court, is not a simple remedial statute intended for the benefit of the workers. The Washington Act, in stark contrast, is remedial in nature and should be liberally construed, with doubts resolved in favor of the worker. Its goal is to insure fair compensation of disabled workers.

Cockle v. Dep't of Labor & Indus., 96 Wash. App. 69, 84, 977 P.2d 668, 676 (1999) (citations and internal quotation marks omitted).

125. *Cockle*, 142 Wash. 2d at 819–20, 16 P.3d at 592.

126. *Id.* at 820 n.9, 16 P.3d at 592 n.9 (citing *Ex Parte Murray*, 490 So. 2d 1238, 1240–41 (Ala. 1986); *Ragland v. Morrison-Knudsen Co.*, 724 P.2d 519, 521 (Alaska 1986); *Meeker v. Provenant Health Partners*, 929 P.2d 26, 29 (Colo. Ct. App. 1996); and *Ashby v. Rust Eng'g Co.*, 559 A.2d 774 (Me. 1989)).

127. *Id.* at 820, 16 P.3d at 592.

128. *Id.* at 827–28, 16 P.3d at 596 (Talmadge, J., dissenting).

129. 192 Wash. 671, 74 P.2d 227 (1937) (holding a person, who went into the woods with his neighbor on Sunday to assist the neighbor in obtaining firewood for sale without agreeing to specific compensation, was not covered under IIA).

130. *Cockle*, 142 Wash. 2d at 828, 16 P.3d at 596 (Talmadge, J., dissenting).

131. *Id.* (Talmadge, J., dissenting) (citing 53–55 Op. Att'y Gen. 240 (1954) available at http://www.wa.gov/ago/opinions/1953-55/opinion_1953-55_240.html).

132. *Id.*

133. *Id.* at 828–29, 16 P.3d at 597 (Talmadge, J., dissenting).

134. *Id.* at 829, 16 P.3d at 597 (Talmadge, J., dissenting). Chief Justice Guy in his concurrence in dissent recognized the difference between the majority and dissent as to the origins of

The dissent further argued that Washington case law supports deference to the Department's interpretation of IIA's wage definition.¹³⁵ According to the dissent, IIA is plainly a "specialized statutory enactment."¹³⁶ Because the Department has expertise in applying IIA and the Board in interpreting industrial insurance law, the dissent considered the two to be in the best position to determine the meaning of "wages" under IIA.¹³⁷ As the agencies charged with carrying out IIA's provisions, neither the Department nor the Board ever considered fringe benefits, including medical and dental coverage, as falling within the definition of "wages."¹³⁸ Therefore, the dissent concluded that substantial deference should be given to these agencies' interpretations of RCW 51.08.178.¹³⁹

4. The Policy Analysis

The *Cockle* majority addressed three policy concerns raised by the Department. First, the majority dismissed the Department's warning that expanding wages to encompass employer-provided health insurance would lead to double recovery when medical and dental coverage is continued during the worker's disability period.¹⁴⁰ The majority noted that "any portion of 'wages' that injured workers continue to enjoy during their disability period is not part of their 'economic loss.'"¹⁴¹

Second, the majority was not persuaded by the Department's argument that including employer-provided health insurance in wages

the wording at issue. He emphasized, however, the importance of the 1971 enactment of IIA's wage definition:

[B]ecause RCW 51.08.178 was actually enacted in 1971, the listing of only board, housing and fuel as benefits which count as wages indicates "other consideration of like nature" should be construed narrowly. . . . [H]ealth or medical insurance was a significant form of fringe benefits in 1971, [and] the Legislature's failure to list it expressly indicates the Legislature did not consider it to be "wages." It is unlikely the Legislature would relegate such an important kind of fringe benefit to the category of "other consideration of like nature."

Id. at 835, 16 P.3d at 600 (Guy, C.J., concurring in dissent).

135. *Id.* at 829, 16 P.3d at 597 (Talmadge, J., dissenting).

136. *Id.*

137. *Id.* (citing WASH. REV. CODE §§ 51.14, 51.52.010 (2000)). The Department administers Washington's industrial insurance fund and regulates self-insured employers. The Board consists of representatives from labor, management, and the public.

138. *Id.*

139. *Id.* "Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review." *Overton v. Washington State Econ. Assistance Auth.*, 96 Wash. 2d 552, 555, 637 P.2d 652, 654 (1981).

140. *Cockle*, 142 Wash. 2d at 814-15, 16 P.3d at 597.

141. *Id.* at 815 n.6, 16 P.3d at 589 n.6 (citing WASH. REV. CODE § 51.12.010 (2000)).

would make Washington's workers' compensation system costly, burdensome, and time-consuming.¹⁴² The majority recognized that compensation is designed to provide "prompt, sure, [and] certain" relief for injured workers, but noted that the Department could not disregard statutory provisions merely for their administrative inconvenience.¹⁴³ Instead, the majority found that the reasonable value of health insurance should be measured by the monthly premium actually paid by an employer rather than the insurance's "hypothetical" market value.¹⁴⁴ In doing so, the majority acknowledged the Department's concern that adding the hypothetical replacement cost of health insurance to workers' compensation rates would be prohibitively expensive and would require "lengthy investigation and consultation of experts."¹⁴⁵ The majority concluded that an employer's contribution or payment constitutes a "readily identifiable" and "reasonable" measure to ascertain the value of employer-provided benefits.¹⁴⁶

Finally, the majority ignored the Department's warning of a potential flood of litigation over what kind of modern work benefits should be included in IIA's definition of "wages."¹⁴⁷ Although the majority recognized an inherent weakness in the phrase "other consideration of like nature" in RCW 51.08.178(1),¹⁴⁸ the majority found that its application of the *ejusdem generis* rule substantially addressed the Department's concerns.¹⁴⁹ The majority noted that health insurance is "of like nature" to "board, housing, [and] fuel" because such insurance is "objectively critical" to protecting the basic health and survival of workers.¹⁵⁰ Furthermore, the majority emphasized that its construction carries out IIA's perceived purpose of minimizing an in-

142. *Id.* at 820, 16 P.3d at 592.

143. *Id.* (quoting *Weyerhaeuser Co. v. Tri*, 117 Wash. 2d 128, 138, 814 P.2d 629, 634 (1991)).

144. The majority rejected as unnecessary the Court of Appeal's hypothetical objective buyer-seller standard for ascertaining the reasonable value of employer-provided benefits. *Id.* at 820-21, 16 P.3d at 592.

145. *Id.* at 820 n.10, 16 P.3d at 592 n.10 (quoting Supplemental Brief of Petitioner, *supra* note 63, at 16, 18, App. E.).

146. The majority agreed with Justice Marshall that "[w]hile an employer's contribution may understate the true value of the benefits received . . . , it nonetheless provides a readily identifiable and therefore reasonable surrogate for the 'advantage' received . . . [and] has long been accepted as a reasonable measure of the value of fringe benefits. . . ." *Id.* at 821 n.10, 16 P.3d at 592 n.10 (quoting *Morrison-Knudsen Constr. Co. v. Dir. Office of Workers' Comp. Programs*, 461 U.S. 624, 642-43 (1983) (Marshall, J. dissenting)).

147. *Id.* at 821, 16 P.3d at 593.

148. *Id.* ("[T]he Legislature's current mandate to include 'other consideration of like nature' to 'board, housing, [and] fuel' is ambiguous and by no means easily applied to all in-kind work benefits the offered by employers today.").

149. *Id.*

150. *Id.* at 822-23 n.13, 16 P.3d at 594 n.13.

jured worker's "suffering and economic loss."¹⁵¹ Therefore, the phrase "board, housing, fuel, or other consideration of like nature" means "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival," including medical and dental coverage.¹⁵²

In its policy analysis, the dissent expressed concern about the practical implications of the majority's policymaking. "[T]he majority offers very little guidance to the Department or self-insured employers as to what its policy for the scope of benefits under [IIA] will mean in the real world."¹⁵³ Employers offer numerous types of benefits to employees as consideration for employment, and these benefits are, therefore, generally part of collective bargaining between labor and management.¹⁵⁴ The dissent argued, however, that courts cannot adequately determine what benefits would be "core" to a particular injured worker.¹⁵⁵ Instead, the dissent asserted that the decision to alter IIA's wage definition should be left to the Legislature because that body is better equipped to hear from all parties concerned and to balance the interests of employers against the needs of injured workers.¹⁵⁶

5. The Conclusions

The *Cockle* majority concluded that the definition of "wages" in RCW 51.08.178 included Cockle's employer-provided health insurance because the premiums paid by her employer in exchange for her labor constituted a "core, nonfringe" component of her lost wages.¹⁵⁷ As a consequence, the majority found that the Department should have added the value of Cockle's medical and dental coverage to her wage basis when it calculated her worker's compensation payments.¹⁵⁸ The majority stated, however, that IIA would not provide a remedy where an injured worker was deprived of the reasonable value of employer-provided benefits that are *not* critical to protecting his or her basic health and survival.¹⁵⁹ In the final analysis, the majority decided that a worker's injury-caused deprivation of health care coverage ob-

151. *Id.* at 822, 16 P.3d at 593 (quoting WASH. REV. CODE § 51.12.010 (2000)).

152. *Id.* (quoting WASH. REV. CODE § 51.08.178(1) (2000)).

153. *Id.* at 831, 16 P.3d at 598 (Talmadge, J., dissenting).

154. *Id.*

155. *Id.*

156. *Id.* at 834, 16 P.3d 599 (Talmadge, J., dissenting).

157. *Id.* at 823, 16 P.3d at 594.

158. *Id.*

159. *Id.*

jectively qualifies as “the suffering and economic loss” that IIA was designed to remedy.¹⁶⁰

On the other hand, the dissent concluded that employer-provided health insurance is a fringe benefit, which the Legislature specifically excluded from the definition of “wages” in RCW 51.08.178.¹⁶¹ The dissent rejected the majority’s interpretation of the phrase “other consideration of like nature” and argued that the majority’s interpretation has no principled limitation because many other types of employer-provided benefits constitute “necessities of life” or “core, nonfringe benefits.”¹⁶² The dissent also declined to follow the view that wages constitute *any* consideration received by the worker, including medical and dental coverage.¹⁶³ The dissent would have reversed the Court of Appeals’ decision and reinstated the Department’s and the Board’s decisions.¹⁶⁴

IV. CRITIQUE OF THE *COCKLE* DECISION

Given the strong disagreement between the majority and the dissent in *Cockle* over IIA’s wage definition for calculating workers’ compensation, this Section will first address the general question of whether injured workers’ wages should include the value of employer-provided health insurance. This Section will then argue that the *Cockle* majority misinterpreted the term “wages” in RCW 51.08.178 and effectively adopted a definition that produces strained results when applied to other IIA provisions. Finally, this Section will encourage the Legislature to limit the scope of the *Cockle* decision by narrowing IIA’s wage definition.

A. *Cockle* Inappropriately Broadened the Definition of “Wages” by Including Employer-Provided Health Insurance

In considering whether wages includes benefits, it must be noted that employers provide a variety of benefits to employees as inducements or consideration for employment.¹⁶⁵ Furthermore, monetary

160. *Id.* (quoting WASH. REV. CODE § 51.12.010 (2000)).

161. *Id.* at 834, 16 P.3d at 600 (Talmadge, J., dissenting).

162. *Id.* at 824, 16 P.3d at 594 (Talmadge, J., dissenting).

163. *Id.* at 830–31, 16 P.3d at 598 (Talmadge, J., dissenting).

164. *Id.* at 834, 16 P.3d at 599 (Talmadge, J., dissenting).

165. As Justice Talmadge noted in dissent:

Such benefits might include life insurance benefits, stock option plans, deferred compensation plans, profit sharing plans, dependent care assistance plans, group legal services plans, interest free or low interest loan programs, savings plans, 401(k) matching plans, sick leave benefits, vacation benefits, death and disability benefits, charitable contributions matching programs, employer-funded scholarships and fellowships, tuition waivers, and alcohol and drug rehabilitation programs.

compensation and benefits combined will usually form the basis of the employment agreement between labor and business as a result of their collective bargaining.¹⁶⁶ Whether classified as in-cash or in-kind consideration, employer-provided benefits are typically referred to as fringe benefits, not a part of wages.¹⁶⁷

1. The Characterization Problem

In *Cockle*, the majority found that board, housing, fuel, and health care are "core, nonfringe benefits" that all share the "like nature" of being "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity."¹⁶⁸ The distinction between "fringe" and "nonfringe" becomes important because the latter implies that the value of the benefit, like a worker's wages, is indeed readily identifiable and reasonably calculable.

The *Cockle* majority correctly stated that the definition of "wages" in RCW 51.08.178 does not include merely "any other consideration," but rather "other consideration of like nature" to board, housing, and fuel.¹⁶⁹ Although the majority acknowledged that the Legislature intended a more limited construction of the term "wages," the majority's reasoning leads to a contradictory result.¹⁷⁰ The majority noted "the Legislature's express mandate that the 'reasonable value' of all 'consideration of like nature from the employer as part of the contract of hire' be included in the calculation of every injured worker's 'wages.'"¹⁷¹ The majority also observed that "the language of RCW 51.08.178(1) suggests the Legislature intended 'wages' to include the reasonable value of all core, nonfringe benefits critical to

Id. at 831, 16 P.3d at 598 (Talmadge, J., dissenting).

166. See *Employees of Pac. Mar. Ass'n. v. Hutt*, 88 Wash. 2d 426, 434, 562 P.2d 1264, 1269 (1977) (describing a labor dispute concerning wages, benefits, and working conditions that were determined by the results of negotiations between striking workers and the employers' association); see also Thomas A. Kochan, *Labor Policy for the Twenty-First Century*, 1 U. PA. J. LAB. & EMP. L. 117 (1998) (discussing modern trends in collective bargaining over wages, benefits, and employment conditions).

167. See *Bellevue Sch. Dist. No. 405 v. Bentley*, 38 Wash. App. 152, 159, 684 P.2d 793, 797 (1984) ("While benefits may be included as part of compensation, generally benefits are considered separately from salary."). "We assume that 'benefits' refers to what is commonly called 'fringe benefits.'" *Id.* at 158 n.1, 684 P.2d at 797 n.1; see also *Scholtfeld v. Mel's Heating & Air Conditioning*, 445 N.W.2d 918, 927 (Neb. 1989) (stating that fringe benefits are not part of the wage contract because they are not the result of an employee's individual labor, but rather the fruit of collective bargaining).

168. *Cockle*, 142 Wash. 2d at 822, 16 P.3d at 594.

169. *Id.* at 810, 16 P.3d at 587.

170. *Id.*

171. *Id.* at 809 n.4, 16 P.3d at 587 n.4 (emphasis added) (citing WASH. REV. CODE § 51.08.178).

protecting workers' basic health [and] survival."¹⁷² This language, however, sounds similar to the "any and all forms of consideration" standard in *Rose*,¹⁷³ which the *Cockle* majority expressly rejected.¹⁷⁴

The *Cockle* majority appears to address this problem by limiting the scope of "other consideration of like nature" to "core, nonfringe benefits."¹⁷⁵ In addition, the majority stated that IIA does not contemplate including the value of "fringe benefits" that are *not* critical to protecting workers' basic health and survival.¹⁷⁶ However, in comparing the phrases "other consideration of like nature" and "board, housing, [and] fuel," it appears that the majority's decision would not necessarily be restricted to employer-provided health insurance. Instead, the interpretation of the phrase "other consideration of like nature" might encompass all other in-kind "fringe" or "nonfringe" benefits that are critical to protecting workers' health and survival.¹⁷⁷ For example, in *In re Douglas A. Jackson*,¹⁷⁸ the Board said, "A disability policy that pays the monthly mortgage obligation of a disabled worker . . . arguably is 'of like nature' to employer-provided shelter."¹⁷⁹ Therefore, the majority's interpretation leaves room for the inclusion of

172. *Id.* at 821 n.11, 16 P.3d at 593 n.11 (emphasis added).

173. *Rose v. Dept. of Labor & Indus.*, 57 Wash. App. 751, 758, 790 P.2d 201, 205, *review denied* 115 Wash. 2d 1010, 797 P.2d 512 (1990). The *Rose* opinion was written by then Appellate Judge Gerry Alexander, who now serves as Chief Justice of the Washington Supreme Court. Chief Justice Alexander presumably remembered the *Rose* standard when he agreed with the *Cockle* majority. This presumption shows a potential flaw in the majority's reasoning that it did not construe the phrase "other consideration of like nature" to mean "any and all consideration of like nature" to board, housing and fuel. Arguably, the *Rose* court took an intellectually honest view of wages in light of the range of benefits that induce an individual to work.

174. *Cockle*, 142 Wash. 2d at 821, 16 P.3d at 593.

175. *Id.* at 822-23, 16 P.3d at 594.

176. *Id.* Although the facts in *Cockle* raise the issue of whether medical and dental coverage is necessary to protect the "basic health and survival" of the injured worker, this phrase, as applied to other cases, may include the worker's mental health and financial well-being. See generally Martha T. McClusky, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657 (1998) (discussing statutory restrictions and exclusions for mental stress claims).

177. See, e.g., *Washington Water Power Co. v. Miller*, 52 Wash. App. 565, 566, 762 P.2d 16, 17 (1988) (noting that WWP's claimed expenses included wages and amounts to cover vacation, sick leave, holidays, and other fringe benefits). The Board has also addressed the issue. See, e.g., *In re Melvin Christenson*, No. 88 1477 (July 2, 1991), available at <http://www.wa.gov/biia/881477.htm> ("Burial expenses, like medical payments, are simply a reimbursement for services rendered . . . as opposed to prescribed benefits payable to the worker or surviving beneficiaries."). Arguably, any decisions by the Board that have followed the reasoning in *Christenson* would be subject to review under the *Cockle* decision, because in-kind benefits that are critical to workers' health and survival are tantamount to prescribed benefits rather than reimbursements. For periodic updates on the Board's significant decisions, visit <http://www.wa.gov/biia/contents.htm>.

178. No. 99 21831 (Aug. 13, 2001), available at <http://www.wa.gov/biia/9921831.htm>.

179. *Id.*

benefits that are usually excludable from the definition of "wages" in RCW 51.08.178.

2. The Subjectivity Problem

The definition of "wages" should not include employer-provided health insurance because what constitutes a "core benefit" to an injured worker depends upon personal preferences. For example, although *Cockle* argued her health insurance was "core" to her well-being,¹⁸⁰ an older injured worker approaching retirement age may find that deferred compensation plans and pension benefits constitute a core benefit. For a younger employee, vacation benefits or tuition assistance programs for children in higher education might equally be a core benefit. Given the subjectivity inherent in these circumstances, it would be difficult for courts to ascertain what is core to the health and survival of each worker.¹⁸¹

The *Cockle* majority found that core benefits encompass health care, food, shelter, and heat since these items are "critical to protecting workers' basic health and survival."¹⁸² In opposition, the dissent pointed out that this phrase is tantamount to "necessities of life" and that health care coverage cannot be found in the statutory language.¹⁸³ The dissent's view is more persuasive because the Legislature explicitly referenced various forms of compensation, but specifically chose not to mention benefits such as health insurance in the definition of "wages." Although health benefits are likely "core" to an injured worker's health and survival, it should not be part of wages because the Legislature did not mention such coverage in IIA's wage definition.

3. The Categorization Problem

The outcome in most cases after *Cockle* will depend upon the categorization of the benefits themselves, particularly when the worker claims that the benefits are in-kind and "readily identifiable and reasonably calculable." The benefits in question will either be more

180. In addition to her medical and dental coverage, *Cockle* initially raised the issue of vacation pay. *Cockle*, 142 Wash. 2d at 806 n.1, 16 P.3d at 585 n.1.

181. The majority noted *Cockle*'s argument that her health care coverage should be included in wages, since it provided valuable "present peace of mind" and qualified as "real economic gain." *Id.* at 816 n.8, 16 P.3d at 590 n.8. The majority did not specifically address this argument, which adds support to the subjective meaning of "core benefits."

182. *Id.* at 822, 16 P.3d at 594. After the *Cockle* decision, the Board held that an injured worker's monthly wages at the time of injury include the reasonable value of employer-provided medical, dental, and vision insurance benefits. *In re Douglas A. Jackson*, No. 99 21831, available at <http://www.wa.gov/biia/9921831.htm>.

183. *Cockle*, 142 Wash. 2d at 831, 16 P.3d at 598 (Talmadge, J., dissenting).

properly classified as “core” or “nonfringe” benefits that are critical to protecting the worker’s basic health and survival or merely as fringe benefits that are not critical to protecting the injured worker’s basic health and survival.

For example, in *In re Ronald Tucker*,¹⁸⁴ the Board determined that an employer-provided pension benefit was a fringe benefit rather than a “core” or “nonfringe” benefit and therefore should not be included in IIA’s wage definition.¹⁸⁵ Similarly, in *In re Douglas A. Jackson*,¹⁸⁶ the Board held that employer contributions for life insurance were not wages within the meaning of RCW 51.08.178 because “purchasing this insurance ha[d] nothing to do with the worker’s health and survival, since funds are paid only upon his [or her] death.”¹⁸⁷ This case-by-case determination will inevitably slow down the process of administering workers’ compensation benefits to injured workers. Therefore, specific factors and methods should be in place to help guide the Board in making decisions that govern all claims of like nature.¹⁸⁸

4. The Valuation Problem

Finally, IIA’s definition of “wages” should not include employer-provided health insurance since its value is often difficult to calculate. Commentators have discussed many health care “cost problems” such as the rising cost of health care to the economy, the direct cost of health benefits and programs for the government, and the increasing costs of health insurance premiums and out-of-pocket expenses of consumers.¹⁸⁹ In Washington, the difficulty of ascertaining the value of health insurance is exacerbated by the state’s rising rate of

184. Nos. 00 11573 & 00 17279 (June 22, 2001), available at <http://www.wa.gov/biia/0011573.htm>.

185. *Id.*

186. *In re Douglas A. Jackson*, No. 99 21831, available at <http://www.wa.gov/biia/9921831.htm>.

187. *Id.*

188. In a recent posting on its website, the Department announced reasons why rules on this subject may be needed. “The proposed rules would provide the methods and factors used in calculating a worker’s wage at the time of injury or date of manifestation of an occupational disease. These rules would include clarification of recent Supreme Court interpretations.” DEP’T OF LABOR & INDUS., PROPOSAL STATEMENT OF INQUIRY, WSR-01-20-091 (Oct. 2001), available at <http://www.lni.wa.gov/rules/WorkersCompensation/Industrial-Insurance/WageCalculation/Preproposal.htm> (on file with *Seattle University Law Review*).

189. See generally WING ET AL., *supra* note 28, at 1102–03 (discussing and distinguishing costs of health care to the economy, government, consumers, employers and providers, and other interest groups).

the uninsured.¹⁹⁰ Under these circumstances, the value placed on health insurance by the uninsured worker is arguably influenced by the worker's inadequate risk assessment and lack of income. This phenomenon has also occurred in cases involving insured workers.¹⁹¹ Therefore, all workers assess the value of health insurance differently.¹⁹²

In *Cockle*, the majority properly rejected a subjective theory for measuring the value of benefits. It held that the "reasonable value" of health care coverage should be measured "by the monthly premium actually paid by the employer to secure it—or in the case of a group plan, the worker's portion thereof."¹⁹³ The majority also questioned why injured workers who were receiving more of their earnings in in-kind consideration should be given less workers' compensation than those who were receiving a larger share of their earnings as monetary pay.¹⁹⁴ Although the majority's argument has some force, its theory focuses on the "earnings" that a worker receives from his or her em-

190. According to a survey by the United States Census Bureau, Washington's uninsured rate rose from 12.3% in 1998 and 1999 to 13.8% in 1999 and 2000. Carol Smith, *State's uninsured rate is rising*, SEATTLE POST-INTELLIGENCER, Sep. 28, 2001, at B-1, available at http://seattlepi.nwsource.com/local/40655_health28.shtml. Because of the "economic slump, big jumps in unemployment, huge increases in health-insurance premiums, and employers' willingness to pass on fast-rising health costs to their workers, . . . the number of uninsured Americans today is probably well above 40 million, and is likely to grow in the period ahead." *Id.* (quoting Ron Pollack, executive director of Families USA, a non-profit health care advocacy group in Washington, D.C.).

191. See, e.g., *Clark v. Rust Eng'g Co.*, 595 A.2d 416, (Me. 1991) (holding that the value employee placed on employer's accident and sickness benefits and life and medical insurance plans did not fall within the definition of "wages" for workers' compensation purposes).

192. See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. L. J. 29, 47 (2001) ("For example, suppose unhealthy workers cost \$270 to insure. Employers cannot distinguish unhealthy from healthy job applicants, although the applicants know which they are (and unhealthy applicants, knowing their status, value health insurance at \$300). If so, no employer can remain competitive while offering health insurance to all workers.").

193. *Cockle*, 142 Wash. 2d at 821, 16 P.3d at 592. One critic of this Note proposes an additional valuation method. In response to the argument that the value of health benefits is difficult to calculate, Robert Stern of the Washington Labor Council opines: "Have you not heard of COBRA? One can ascertain the amount paid b[y] the employer quite easily." E-mail from Robert Stern, to Matthew Adams (Nov. 28, 2001, 12:40 PST) (on file with *Seattle University Law Review*). The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) does not require employers to pay the premium for health benefit continuation coverage; instead, the employer may charge up to 102% of the "applicable premium" to cover the costs of administering the plan. 29 U.S.C. § 1162(3) (1999); *Draper v. Baker Hughes, Inc.*, 892 F. Supp. 1287, 1293 (Cal. 1995). Therefore, "the employer can only charge the net cost of providing the continuation coverage (the premium less experience rebates and dividends)." Roberta Casper Watson, *COBRA Health Continuation Benefits*, C940 ALI-ABA 25, 90 (1994); Thomas H. Somers, *COBRA: An Incremental Approach to National Health Insurance*, 5 J. CONTEMP. HEALTH L. & POL'Y 141 (1989).

194. *Cockle*, 142 Wash. 2d at 818, 16 P.3d at 591.

ployer, leaving open the possibility that the true value of health care will consist of the employer's contribution and/or the value of the same benefit derived from a different source.¹⁹⁵ This possibility complicates the measurement of the "reasonable value" of a benefit like health care coverage.

Furthermore, some employers who self-insure for workers' compensation also self-insure for their workers' health insurance. These employers do not pay premiums for health insurance, but directly pay their workers' medical bills.¹⁹⁶ Therefore, it is difficult to ascertain the cash value of health benefits to these workers, especially when they overuse medical services to justify workers' compensation payments, as they often do.¹⁹⁷

The majority attempts to address the valuation of benefits by relegating the phrase "other consideration of like nature" to "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury."¹⁹⁸ The majority's conclusion that health insurance falls within the definition of "other consideration of like nature" is aided by the parties' stipulation to the value of *Cockle's* coverage.¹⁹⁹ However, determining and valuing each benefit made available by the employer places an administrative and controversy-laden burden on the Department and self-insured em-

195. It is beyond the scope of this Note and of the *Cockle* opinion to address a looming "what if." Under certain circumstances, workers drawing workers' compensation will have health benefits provided through some other mechanism: spousal support, social security, Medicaid, or some yet-unimagined state program. Under the *Cockle* opinion, would workers also receive an allowance for the value of their employer-provided health insurance? If *Cockle* is understood to establish the rule that health care is a "core" worker benefit, then perhaps not, since health care will be available. If, instead, *Cockle* is understood to establish the rule that the value of employer-provided health insurance is a "core" worker benefit, then, perhaps yes. Either way, the jurisprudence will have to accommodate substantive law from other realms, perhaps even raising Employment Retirement Income Security Act (ERISA) implications. It is also beyond this Note's scope to contemplate whether the difference in value between, say, a Medicaid health plan and the previously enjoyed employer-provided health plan would be compensable.

196. "[A]n employer makes a contribution towards the purchase of health benefits for an employee or that employee's dependent, either directly or through a 'cafeteria' arrangement, or establishes a self-insurance scheme that directly pays the employee's medical bills." WING ET AL., *supra* note 28, at 98.

197. One commentator on workers' compensation has stated:

[S]ubjective elements of the workers' compensation system encourage excessive use of medical services. Unlike health or government program coverage, where the individual has no economic incentive to continue medical treatment beyond its remedial value, an injured worker can use on-going medical care as evidence of the severity of disability to justify benefit payments under the indemnity component of workers' compensation.

Ballen, *supra* note 2, at 1293.

198. *Cockle*, 142 Wash. 2d at 822, 16 P.3d at 594.

199. *Id.* at 805-806, 16 P.3d at 585.

ployers. This burden will necessarily delay workers' compensation payments and generate disputes over the valuation of benefits.²⁰⁰

The *Cockle* majority's interpretation of the phrase "other consideration of like nature" in RCW 51.08.178(1) unnecessarily complicates the statute's complex wage-calculation formula and, in turn, the payment of workers' compensation. First, the majority leaves room for the inclusion of work benefits that are usually excludable from wages. Second, what constitutes a "core benefit" to an injured worker depends upon personal preferences. Finally, it is difficult to fashion a fair and efficient method to determine and value "core, nonfringe" benefits, particularly since workers often move between different employers who offer different types of insurance policies and benefits.

B. Cockle's Definition of "Wages" Will Impair the Recognized Perception of "Economic Loss" and "Wage-Earning Capacity" as Used in the Industrial Insurance Act

Intertwined with the notion of workers' compensation as wage replacement is the concept of "lost earning capacity," which focuses on whether an injured worker retains the ability to perform at a gainful occupation.²⁰¹ If a worker is unable to perform at a gainful occupation, "lost earning capacity" entitles him or her to wage-replacement benefits for temporary loss of wage-earning capacity,²⁰² or to a pension for permanent loss of wage-earning capacity.²⁰³

The *Cockle* majority's finding that an injured worker should be compensated based upon his or her actual "lost earning capacity" should not include the value of employer-provided health insurance because it would upset long-established notions of "economic loss" and "wage-earning capacity." For example, if IIA's wage definition were to include all in-kind consideration, the calculation of wages for seasonal, part-time, or intermittent workers would be difficult.²⁰⁴ As

200. "[I]t became obvious there was little consensus among L&I's stakeholders regarding solutions to challenges posed by the *Cockle* decision and other complexities in the existing law." DEP'T OF LABOR & INDUS., WASHINGTON STATE WORKERS' COMPENSATION BENEFIT STUDY at 2 (Oct. 2001) (on file with *Seattle University Law Review*) [hereinafter BENEFIT STUDY].

201. *Double D Hop Ranch v. Sanchez*, 133 Wash. 2d 793, 798, 947 P.2d 727, 729 (1997).

202. See WASH. REV. CODE § 51.32.090 (2000).

203. See WASH. REV. CODE § 51.08.160 (2000) ("'Permanent total disability' means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation."); WASH. REV. CODE § 51.32.060(1) (2000) (providing that when "the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly during the period of such disability" if other specified statutory requirements are met).

204. WASH. REV. CODE § 51.08.178(2) (2000) (emphasis added) provides:

Nancy Thygesen Day argued in her amicus curiae brief for Washington Self-Insurers Association:

The Department or the self-insured employer would be required to look back at each and every employer the worker had during a representative 12-month period, determine every monetary or in-kind payment to the worker, determine the monetary value of every in-kind payment to the worker and then average the "wages" to determine the workers' wages for time-loss compensation purposes.²⁰⁵

The Department, moreover, will face a number of complexities and inconsistencies when calculating the wages of workers employed in other categories of employment.²⁰⁶ If the Department and self-insured employers must spend additional time and resources to adjudicate claims, the payment of benefits will be delayed. Significant disruptions in IIA's workers' compensation scheme will not only hinder swift and certain relief for injured workers but also frustrate the "closely calculated system of wage-loss benefits."²⁰⁷

In addition, the Legislature stated, "One of the primary purposes of [IIA] is to enable the injured worker to become employable at gainful employment."²⁰⁸ What is "gainful" depends upon the wage-earning capacity the worker retains after a work-related injury. Under the majority's theory of "wages," the inquiry into whether an injured

In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the *monthly wages* shall be determined by dividing by twelve the *total wages earned*, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

The Washington Supreme Court has interpreted this statute in several cases. See, e.g., *Dep't of Labor & Indus. v. Avundes*, 140 Wash. 2d 282, 284, 996 P.2d 593, 594 (2000) ("essentially part-time or intermittent" workers); *Double D Hop Ranch v. Sanchez*, 133 Wash. 2d 793, 796, 947 P.2d 727, 728 (1997) ("exclusively seasonal" workers). In a recent study, the Department acknowledged that a difficulty in calculating benefits includes determining employment patterns – intermittent, part-time, and seasonal. *BENEFIT STUDY*, *supra* note 200.

205. Supplemental Brief of Amicus Curiae Washington Self-Insurers Ass'n at 6, *Cockle v. Dep't of Labor & Indus.*, 142 Wash. 2d 801, 16 P.3d 583 (2000) (No. 68539-8).

206. Examples of complexities and inconsistencies in the current law include: (1) two separate formulas used to determine the wages of part-time employment without guidance on how to apply them; (2) no formula to fairly and consistently calculate the wages of workers on variable shifts or non-standard workweeks, or for workers whose pay is based upon production; (3) and no provisions to calculate the wages of self-employed workers. *BENEFIT STUDY*, *supra* note 200, at 5.

207. *Brand v. Dep't of Labor & Indus.*, 139 Wash. 2d 659, 671, 989 P.2d 1111, 1117 (1999) (quoting 8 LARSON § 83.11 (1999)).

208. WASH. REV. CODE § 51.32.095(1) (2000). "[G]ainful occupation' requires more than the worker exercis[ing] some control and management of a business of which he is the proprietor." *Layrite Prod. Co. v. Degenstein*, 74 Wash. App. 881, 888, 880 P.2d 535, 538 (1994).

worker is capable of performing at a gainful occupation must consider any employment providing value to the worker that is monetarily equivalent to gainful wages. This theory suggests that any employment compensating an injured worker with sufficient in-kind services will equate to the monetary earnings of a worker in a gainful occupation. Therefore, if an injured worker is capable of obtaining and performing a job that provides only "in-kind components . . . that are critical to protecting workers' basic health and survival,"²⁰⁹ with real economic value equaling gainful monetary wages, the worker will not be considered totally disabled because he or she retains wage-earning capacity.²¹⁰

Finally, under the *Cockle* majority's theory, the value of in-kind benefits received by the injured worker might produce more wages during post-injury employment. This may occur when, as a result of an industrial injury, a worker moves from a higher paying, no-benefit job to a lesser-paying, multi-benefit job. Such an occurrence will reduce or eliminate "lost earning capacity" benefits.²¹¹ Under the majority's theory, the payment in-kind would not be excluded from wages, but would be included based upon a "reasonably calculable" monetary value. The injured worker would, in turn, be commanding more in wages with a reduced physical capacity and a lesser hourly monetary payment than he or she was earning prior to the industrial injury, hence, not entitled to loss of earning power benefits under RCW 51.32.090(3).

C. *Cockle* Adopts a Definition of "Wages" Producing Strained Results in Other Contexts Throughout The Industrial Insurance Act

The *Cockle* majority's finding that other statutory provisions do not show legislative intent to exclude employer-provided benefits from the definition of "wages" fails to recognize that the definition will ap-

209. *Cockle v. Dep't of Labor & Indus.*, 142 Wash. 2d 801, 822, 16 P.3d 583, 594 (2001).

210. The notions of "gainful employment" and "economic loss" are inextricably tied. When an injured worker cannot maintain gainful employment, that worker suffers economic loss. In contrast, an injured worker who retains any portion of his or her wages or who continues to receive employer-provided benefits does not suffer economic loss. See *id.* at 815 n.6, 16 P.3d at 589 n.6 ("Logically, any portion of 'wages' that injured workers continue to enjoy during their disability period is not part of their 'economic loss'"); *South Bend Sch. Dist. No. 18 v. White*, 106 Wash. App. 309, 314, 23 P.3d 546, 549 (2001) ("A worker does not suffer economic loss while he or she is continuing to receive personal sick leave benefits equal to the amount he or she would have earned if not injured.").

211. See *Pluto v. Illinois Indus. Comm'n*, 650 N.E.2d 631, 635 (Ill. App. Ct. 1995) (stating that inclusion of fringe benefits in the calculation of wages could work to the claimant's disadvantage where actual earnings of the post-accident employment are less than the original employment but the benefits are significantly greater).

ply in other contexts throughout IIA.²¹² Therefore, the majority's suggestion that inclusion of employer-provided health insurance will *not* have a far-reaching effect on other IIA provisions is unpersuasive. For example, RCW 51.32.090(6) renders an injured worker ineligible for time-loss compensation if the employer "continue[s] to pay him or her the wages which he or she was earning at the time of [the] injury."²¹³ Presumably, under the majority's theory, if the employer chooses to compensate an injured worker post-injury with only in-kind services equaling his or her monetary wages, the worker would be ineligible for time-loss compensation.

Another example involves RCW 51.32.110(4). Under the statute, if the Department or self-insurer directs an injured worker to attend a medical examination requiring the worker "to be absent from his or her work without pay," the worker is to be paid an amount "equal to his or her usual wages for the time lost from work while attending the medical examination."²¹⁴ The majority's computation of wages for these hours or partial days would necessarily include the complex economic valuations for each benefit given or made available to the worker, even though the worker likely loses none of those benefits by taking a few hours away from work to attend the examination.

In addition, RCW 51.32.160(2) allows the Department to suspend or terminate pension benefits if a totally disabled worker "returns to gainful employment for wages."²¹⁵ Under the majority's interpretation, pensioned injured workers can have their benefits terminated if they engage in any activity in exchange for in-kind services with economic value equaling gainful monetary compensation. Therefore, it is likely that employees working for in-kind services would be more vulnerable to fraud penalties.²¹⁶ RCW 51.32.095(1)

212. See WASH. REV. CODE § 51.08.178 (2000) (defining the term "wages" "[f]or the purposes of this title").

213. WASH. REV. CODE § 51.32.090(6) (2000). The majority seems to suggest that an employer will receive an offset if it continues health benefits, as required by statute, during the worker's disability. See *Cockle*, 142 Wash. 2d at 815 n.6, 16 P.3d at 589 n.6 ("We, too, read RCW 51.32.090(6) to mean that, to the extent employer-provided 'wages' . . . are continued during temporary total disability, time-loss compensation is reduced accordingly.").

214. WASH. REV. CODE § 51.32.110(4)(a)(i) (2000).

215. WASH. REV. CODE § 51.32.160(2) (2000).

216. See WASH. REV. CODE § 51.32.240 (2000); *Layrite Prod. Co. v. Degenstein*, 74 Wash. App. 881, 888, 880 P.2d 535, 538 (1994) (holding that the jury had sufficient evidence to find that the injured worker fraudulently misrepresented his working status in his monthly industrial insurance applications when the worker regularly engaged in tasks such as dispatching, driving, and repairing cabs without receiving compensation from his employer taxi company). The Department must annually compile a comprehensive report on workers' compensation fraud in Washington. WASH. REV. CODE § 43.22.331 (2000). During fiscal year 2000, the Department spent \$3.9 million to detect fraud among workers, employers, and providers. DEP'T OF LABOR & INDUS. WORKERS' COMPENSATION FRAUD REPORT, at 1 (May 1, 2001) (discussing

also involves "gainful employment" language, providing for vocational rehabilitation services when such services are "both necessary and likely to enable the injured worker to become employable at gainful employment."²¹⁷ What constitutes "gainful employment" will change under the majority's interpretation, therefore likely impacting the availability of vocational rehabilitation services to injured workers.

Finally, there is evidence that the Legislature did not intend IIA's definition of "wages" to include employer-provided benefits. For example, RCW 51.32.055(7)(a)(v) and .055(9)(a)(iv) contain provisions referring to "wages and benefits."²¹⁸ If the Legislature intended wages to include benefits, it would not have had to delineate between the two within these sections. The majority, however, failed to address this evidence of legislative intent in its opinion in *Cockle*.

D. Cockle May Constitute a Change of Circumstances Requiring Claims' Readjustment

Because *Cockle* expanded the definition of "wages" to include health insurance, *Cockle* may constitute a "change of circumstances" within the meaning of RCW 51.28.040,²¹⁹ justifying a recalculation of compensation. Therefore, *Cockle* may affect how far back an adjuster must go in recalculating and repaying time-loss compensation.

In Washington, two methods exist for providing industrial insurance to workers. First, an employer may insure with the State Fund with the Department administering those claims.²²⁰ Alternatively, employers who meet certain criteria may self-insure.²²¹ Self-insurers may either administer their own claims or contract with third parties to do so.²²² The Department, however, remains responsible for issuing most final orders authorizing or closing an injured worker's claim.²²³

recommendations to improve the Department's ability to address fraud) (on file with *Seattle University Law Review*).

217. WASH. REV. CODE § 51.32.095(1) (2000).

218. See WASH. REV. CODE § 51.32.055(7)(a)(v), (9)(a)(iv) (2000).

219. WASH. REV. CODE § 51.28.040 provides:

If change of circumstances warrants an increase or rearrangement of compensation, like application shall be made therefor. Where the application has been granted, compensation and other benefits if in order shall be allowed for periods of time up to sixty days prior to the receipt of such application.

220. See WASH. REV. CODE § 51.08.175 (2000).

221. See WASH. REV. CODE §§ 51.08.173, 51.14 (2000).

222. See WASH. REV. CODE § 51.14.110.

223. See WASH. REV. CODE §§ 51.04.082, 51.52.060(4)(a) (2000). "In Washington, the department takes a very active role in monitoring the management of claims involving self-insured employers. For example, a self-insured employer cannot reopen a case without approval of the department." AUDIT REPORT, *supra* note 24, at 85.

The *Cockle* decision raises issues concerning the effective date for readjustment of past benefits and when future benefits should be paid or readjusted. *Cockle* arguably applies to all periods of time loss for any open claims where there is no final and binding order setting forth the basis for the worker's wages and time-loss rate. All time loss previously paid on open, compensable claims is therefore subject to upward revision, even if the claim has been open for many years. For these reasons, self-insured employers may be disadvantaged as compared to state-fund employers because of *Cockle*.

For example, in most, if not all, state-fund claims, the Department sets the time-loss rate by appealable order.²²⁴ Once the Department's order is final as to *state-fund* claims, the time-loss rate cannot be revisited and the rate governs for the life of the claim. In virtually all *self-insured* claims, however, the employer pays time-loss compensation and the employer or its administrator calculates and pays the time loss *without* the Department issuing an appealable order setting the rate. In light of *Cockle*, where there is no final and binding order setting the time-loss rate as to self-insured claims, workers may assert that all previously paid compensation must be retroactively adjusted so as to go back to the inception of the claim.

If *Cockle* constitutes a change of circumstances, RCW 51.28.040 may limit retroactive exposure to sixty days prior to the worker's request for the adjustment. On the other hand, *Cockle* may not be considered a change of circumstances because the statute traditionally contemplates factual, not legal changes.²²⁵

E. The Legislature is in a Better Position Than the Court to Alter the Definition of "Wages"

When a party proposes to alter a statutory scheme, the legislative body traditionally addresses the issue. The *Cockle* decision, however, demonstrates a failure to adhere to the respective functions of the three branches of government. First, the legislative process is designed to address the practical implications that will likely result from a statutory adjustment. The dissent in *Cockle* recognized: "The Legislature can hear from all parties with a stake in this controversy; it can balance the interest of employers in a stable premium obligation against the

224. See WASH. REV. CODE § 51.04.080 (2000).

225. See *Foster v. Dep't of Labor & Indus.*, 161 Wash. 54, 60, 296 P. 148, 150 (1931) (holding that RCW 51.28.040 did not apply to change of circumstances through marriage and birth or children to worker who was single at the time of his industrial injury.) "Changes in the law or changes in the interpretation of a law do not constitute a change of circumstances." INSURANCE SERVICES POLICY MANUAL CLAIMS ADMINISTRATION, INTERIM POLICY 4.40 at 5 (Feb. 15, 2001) (on file with *Seattle University Law Review*).

needs of workers who should be compensated for their injuries."²²⁶ Such a circumstance might arise, for example, when labor proposes workers' compensation legislation restricting group self-insurance (allowing small and medium-sized businesses to form associations to provide their own coverage), three-way industrial insurance (allowing private insurers to write industrial insurance coverage), and the retrospective rating program (providing workers' compensation premium refunds to employers in the State Fund that have good safety records).²²⁷ These proposals require legislative action and allow for broader public participation. The judicial policymaking in *Cockle*, however, was more closely intertwined with the resolution of an individual worker's compensation claim rather than the administration of Washington's complex workers' compensation system.

The *Cockle* decision continues the growing trend to remove disputes from the legislative process into courtrooms. Prior to *Cockle*, for example, the Washington Supreme Court held that an injured farm worker was neither a part-time nor intermittent worker at the time of his injury after he worked nineteen different jobs, lasting between one day and six weeks, for fourteen months prior to his injury.²²⁸ Therefore, the court found that the worker's monthly wages should be calculated under RCW 51.08.178(1) for time-loss benefits as though he was continuously employed.²²⁹ After *Cockle*, the court held that a worker's common law claim for wrongful discharge was not precluded by Washington's Law Against Discrimination,²³⁰ which exempts employers with fewer than eight employees from statutorily created remedies for employment discrimination.²³¹ The court also held that a worker who is classified permanently totally disabled and placed on pension may thereafter receive a permanent partial disability award for an unrelated occupational disease that developed prior to the pension award.²³² Decisions like these will continue to erode the already tenuous relationship between business and labor, prompting battles over the scope of workers' compensation in the Legislature.

The dissent in *Cockle* supports this view. Justice Talmadge, the only justice on the *Cockle* court to serve in the Legislature, argued in

226. *Cockle*, 142 Wash. 2d at 834, 16 P.3d at 599 (Talmadge, J., dissenting).

227. See WASHINGTON STATE LABOR COUNCIL'S LEGISLATIVE POSITION PAPERS (2001) (on file with *Seattle University Law Review*).

228. *Dep't of Labor and Indus. v. Avundes*, 140 Wash. 2d 282, 284-85, 996 P.2d 593, 594-95 (2000).

229. *Id.* at 290, 996 P.2d at 597.

230. WASH. REV. CODE § 49.60 (2000).

231. *Roberts v. Dudley*, 140 Wash. 2d 58, 69, 993 P.2d 901, 907 (2000).

232. *McIndoe v. Dept. of Labor & Indus.*, 144 Wash. 2d 252, 266, 26 P.3d 903, 910 (2001).

dissent that courts are “divorced from the reality of modern workplace compensation and the give and take of labor-management negotiations.”²³³ By contrast, Robert Stern of Washington State Labor Council insists that if the position advanced in this Note prevailed in the Legislature, “injured workers would continue to suffer [the] injustice that [had] been done to them until the majority of the supreme court rectified the situation in *Cockle*.”²³⁴ Although lawmakers are not above judges, the Legislature is nonetheless in the best position to determine the efficacy of expanding the definition of “wages” under a specialized statutory enactment such as IIA.

The Legislature acknowledged the complexity of calculating workers’ compensation under *Cockle*. “This decision significantly increases the complexity of calculating benefits and therefore the administrative and legal costs of the workers’ compensation program.”²³⁵ As a consequence, in the 2001–2003 Operating Budget, the Legislature appropriated \$2.9 million to the Department to administer the change mandated by the *Cockle* ruling.²³⁶ The Legislature also directed the Department to develop statutory language that provides greater certainty and simplicity in the calculation of benefits.²³⁷ Finally, the Legislature provided for six additional judges and six support staff to help the Board with its increase in appeals workload and 6.5 full-time employees to help the Board handle the litigation generated by *Cockle*.²³⁸

F. The Legislature Should Narrow the Definition of “Wages” in Response to *Cockle*

In virtually every jurisdiction where the definition of “wages” was expanded by judicial decision, the legislature subsequently nar-

233. *Cockle*, 142 Wash. 2d at 831, 16 P.3d at 598 (Talmadge, J., dissenting).

234. E-mail from Robert Stern, to Matthew Adams (Nov. 28, 2001, 12:40 PST) (on file with *Seattle University Law Review*).

235. Engrossed Substitute Senate Bill (ESSB) 6153, Laws of 2001, ch.7, § 217(2). Importantly, the complexity of calculating of benefits must be considered in light of expensive system costs and potential for fraud. See LABOR & INDUS. WORKERS’ COMPENSATION FRAUD REPORT (May 1, 2000) (discussing the detection of fraud within the \$1 billion annual workers’ compensation system).

236. ESSB 6153, *supra* note 235.

237. *Id.* The Department has recently proposed legislation to implement the *Cockle* decision. This proposal would (1) raise time-loss compensation and permanent total disability compensation benefits to 67% of gross wages; (2) set the value of health benefits, including dental and vision care, at a flat rate of \$307; (3) set the minimum time-loss payment at \$352 per month; (4) leave unchanged death benefits except to increase the minimum to \$352 per month; and (5) allow a worker granted a reopening on a claim to be paid benefits for a period up to sixty days prior to the date of the application. BENEFIT STUDY, *supra* note 200, at 4 (Oct. 2001). Both the draft legislation and the study are filed with *Seattle University Law Review*.

238. ESSB 6153, *supra* note 235, § 215.

rowed the scope of such a judicial interpretation.²³⁹ This phenomenon illustrates the give-and-take of the legislative process. If the Legislature chooses to narrow the scope of the *Cockle* majority's interpretation of RCW 51.08.178, the Legislature should adopt a wage definition that is consistent with the traditional notion that wages do not include fringe benefits.

Although the *Cockle* majority rejected the Department's interpretation of wages, the dissent preferred deferring to the Department since the Department is entrusted with carrying out IIA's provisions.²⁴⁰ Prior to *Cockle*, neither the Department nor the stakeholders understood wages to include employer-provided fringe benefits, such as health insurance, in the definition of "wages." Accordingly, the *Cockle* majority's interpretation of RCW 51.08.178 constituted an unexpected windfall for workers and an unanticipated expense for the Department and self-insured employers that was never factored into industrial insurance premiums or cost projections.²⁴¹

The Legislature intended IIA to provide a method of disposing of workers' compensation claims with as little technical formality as possible.²⁴² With this intent in mind, the Legislature should eliminate the ambiguous language to narrow the definition of "wages" under RCW 51.08.178. For example, the Legislature should remove the phrases "reasonable value" and "other consideration of like nature." Instead, the term "wages" should mean monetary payment plus the actual value of board, housing and fuel received from the employer as

239. See *Ragland v. Morrison-Knudsen Co.*, 724 P.2d 519, 521 (Alaska 1986) (holding that health and welfare benefits could be viewed as "money rate" of compensation and noting that the Alaska legislature revised the statute to exclude medical benefits from wages during litigation of this case in former ALASKA STAT. § 23.30.265(15) (1983)); *Ciampi v. Hannaford Bros. Co.*, 681 A.2d 4, 9 (Me. 1996) (noting Maine legislature acted to amend statute to restrict the fringe benefits included in wages after the court held that health and welfare benefits constituted "wages, earnings, or salary"); *Murphy v. Ampex Corp.*, 703 P.2d 632, 633-35 (Colo. Ct. App. 1985) (holding health and welfare benefits are analogous to board and rent and that the legislature acted to limit fringe benefit coverage to those expressly enumerated in COLO. REV. STAT. § 8-40-201(19)(b) (2000)).

240. *Cockle*, 142 Wash. 2d at 829, 16 P.3d at 597 (Talmadge, J., dissenting).

241. Washington has been recognized as a state with relatively high benefits and low premium costs. It is in the top 25% in benefits offered and the bottom 25% in costs charged. These attributes are largely the result of the structure of the state's system and the way in which the State manages claims. See generally AUDIT REPORT, *supra* note 24. In contrast, David Kaplan, executive director of Washington Self-Insurers Association, argues that the true costs of claims are hidden because under RCW 51.44.100, the State Investment Board has invested surpluses in the accident and medical aid funds, and those investments have realized positive returns in light of the strong economy. If premiums are declining and refunds are being made for state-fund workers, self-insured employers are not benefited because they are not receiving a reduction in premiums.

242. *Hoff v. Dep't of Labor & Indus.*, 198 Wash. 257, 260, 88 P.2d 419, 420 (1939).

part of the hiring contract.²⁴³ In addition, the Legislature should enact a definition that precisely indicates which, if any, work benefits are included in wages, rather than stating “wages does not include fringe benefits, including but not limited to” This latter language creates the potential for disputes over which unlisted fringe benefits are part of wages. On the other hand, restricting qualifying benefits to a closed list of enumerated items shows clear legislative intent to exclude all other benefits.²⁴⁴ This proposal would help to insure faster claims resolution and certainty of costs.²⁴⁵

Alternatively, the Legislature could expressly include in wages employer-provided medical, dental, and vision care, but exclude other fringe benefits. Under this approach, the Legislature should determine includable benefits by considering whether the benefit is critical—like board, housing, and fuel—for workers’ *basic* health and survival. Even if the Legislature chooses to include employer-provided health insurance in IIA’s wage definition, the value of the insurance must be set at a statutory amount, because setting the value at a hypothetical market rate creates unnecessary confusion. In the final analysis, these suggestions would lead to a more precise wage definition that is readily applicable throughout IIA and, most importantly, carry out its stated purpose.

The Legislature enacted IIA to provide swift and certain relief for injured workers, charging the Department to administer payment of time-loss compensation benefits. In exercising its constitutional role, the *Cockle* majority determined that deference to the Department’s interpretation of wages was “inappropriate” because the inter-

243. This suggestion squares with the notion that “an injured worker should be compensated based not on an arbitrarily set figure, but rather on his or her *actual* ‘lost earning capacity.’” *Cockle*, 142 Wash. 2d at 811, 16 P.3d at 588 (emphasis added) (quoting *Double D Hop Ranch v. Sanchez*, 133 Wash. 2d 793, 798, 947 P.2d 727, 729 (1997)).

244. In *Cockle*, the majority stated that the Legislature decided against enumerating all qualifying benefits. See *id.* at 809, 16 P.3d at 587. The majority found as unpersuasive the argument that “‘by not including health insurance in its definition of wages in RCW 51.08.178, the Legislature intentionally excluded it.’” *Id.* at 810 n.4, 16 P.3d at 587 n.4 (quoting *Concurrence in Dissent* (Guy, C.J.)).

245. See ASS’N OF WASHINGTON BUSINESS, STATE LABOR LAW COMPETITIVENESS ISSUES (Jan. 2002) (on file with *Seattle University Law Review*) (stating that the *Cockle* decision has “thrown out 30 years of workers’ compensation law and made it impossible to close any claims with certainty as to final cost. . . . [U]nless there is a legislative fix, it means that most time loss claims will not be finalized until future litigation over the next three to six years determines which additional benefits must be included in the calculation. Employers will have no idea what their costs will be until the litigation is complete.”); BENEFIT STUDY, *supra* note 200, at 2 (acknowledging that the “comments and suggestions made by business and labor representatives . . . made it clear that a broad approach would not produce a workable solution”).

pretation conflicted with IIA's liberal construction mandate.²⁴⁶ The majority pointed out the conflict, but failed to provide a more precise definition of "wages." In essence, the majority judicially expanded IIA to keep pace with recent trends.²⁴⁷ If the *Cockle* majority's interpretation of wages is followed by legislative action, the Department's administration of Washington's complex workers' compensation system will improve and the judicial branch will have better guidance to determine the purpose, scope, and meaning of IIA's provisions.

V. CONCLUSION

By including employer-provided health insurance in IIA's wage definition for calculating workers' compensation, the *Cockle* majority failed to recognize the careful balancing that occurred in determining what should constitute loss of wage-earning capacity, gainful employment, and loss of earning power. Although IIA is remedial and must be liberally construed in favor of the worker, an interpretation of the term "wages" that inserts complex economic variables into a system purposefully designed to provide swift and certain relief with limited employer liability will disrupt the overall workers' compensation system. Furthermore, IIA's purpose may be frustrated over time when employers pass costs to their workers due to the proliferation of litigation, increases in insurance premiums, and limitations on compensation benefits.

IIA represents a careful balance between business and labor interests. If the Legislature intended wages to include health insurance and all other "core" in-kind benefits to which an economic value can be assigned, such directive would appear in IIA. This tipping of the scales is not up to a single injured worker or single court. Although injured workers are "flesh and blood people" who have lost a great deal as a result of workplace injuries, any rework or redesign of the workers' compensation system belongs, if anywhere, in the Legislature. Legislative members are poised to address the plight of their constituents, including injured workers.

246. *Cockle*, 142 Wash. 2d at 812, 16 P.3d at 588 (quoting *Dep't of Labor & Indus. v. Landon*, 117 Wash. 2d 122, 127, 814 P.2d 626, 628 (1991)).

247. See *id.* at 823, 16 P.3d at 594 ("[J]ust as 'board, housing [and] fuel' were core, non-fringe benefits critical to protecting the basic health and survival of workers injured in the early 1900s, whose suffering such legislative language was originally designed to reduce, so also were the health care premiums paid by *Cockle*'s employer in exchange for her labor in the late 1900s a nonfringe component of her lost 'wages.'"). But see *Morrison-Knudsen Constr. Co. v. Dir. Of- fice of Workers' Comp. Programs*, 461 U.S. 624 (1983) (holding that a comprehensive statute such as LHWCA should not to be judicially expanded because of modern trends); *Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs*, 449 U.S. 268, 279-80 (1980) (same).